

1990

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Source Publication:

Canadian Bar Review. Volume 69, Number 4 (1990), p. 623-668.

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Recommended Citation

Watson, Garry D. "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality." *Canadian Bar Review* 69.4 (1990): 623-668.

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THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

Vol. 69

December 1990 décembre

No. 4

DUPLICATIVE LITIGATION: ISSUE ESTOPPEL, ABUSE OF PROCESS AND THE DEATH OF MUTUALITY

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The traditional requirement of Anglo-Canadian law, that issue estoppel applies only as between those who were parties to both the earlier and subsequent litigation, is fast disappearing. However, the disappearance of this requirement of mutuality is presently confused by the courts' invocation of the rubric of "abuse of process", rather than a straight abandonment of the requirement of mutuality. This article describes the abandonment of mutuality in American law and the emergence of the doctrine of non-mutual issue estoppel, and critically examines the movements in Canadian and English law in the same direction. While advocating that Anglo-Canadian courts openly adopt non-mutual issue estoppel, the author puts forward a number of proposals designed to make the handling of duplicative litigation both fairer and more efficient.

La nécessité traditionnelle, en droit anglo-canadien, de n'appliquer la fin de non-recevoir qu'à ceux qui étaient parties au litige à la fois dans la première action et dans les actions suivantes, tombe rapidement en désuétude. Mais la disparition de cette règle de la nécessité d'avoir les mêmes parties n'est pas claire parce que les tribunaux invoquent l'abus de procédures, au lieu d'abandonner franchement la règle de la nécessité. L'auteur de cet article décrit l'abandon de la nécessité d'avoir les mêmes parties en droit américain et l'apparition de la doctrine de la fin de non-recevoir sans que les parties soient les mêmes; il examine de façon critique le développement, dans la même direction, du droit canadien et anglais.

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Thanks to Bill Bogart, Harry Glasbeek, Peter Hogg, Allan Hutchinson, John McCamus, Hiroshi Motomura, Paul Perell, Jack Ratliff, Kent Roach, Tom Rowe, Judith Resnik, Robert Sharpe, David Vaver and Tim Youdan for their helpful comments and to Lisa Henderson, Peter Henderson, Kirk Stevens and Barbara Walsh for their assistance.

Tout en recommandant aux tribunaux anglo-canadiens l'adoption sans équivoque de la fin de non-recevoir sans que les parties soient les mêmes, l'auteur fait un certain nombre de suggestions ayant pour but de rendre plus juste et plus efficace le traitement d'actions à répétition.

The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.¹

Introduction

When may a non-party to a proceeding rely upon findings made in that proceeding in a later action? Never, says the traditional Canadian and English doctrine, because issue estoppel is limited to those who were parties to the earlier litigation, or their privies. To do otherwise would offend the concept of "mutuality", that a party may only take the benefit of a prior decision if it would also have been bound had the decision gone the other way. But if this *is* the law, how do we explain the fact that in twenty-nine out of thirty-one reported decisions on this question in Canada and England since the mid-1970s some form of preclusive effect² has been given to a previous decision in favour of a person who was not a party to the original proceeding? The Americans have a simple answer: mutuality is dead. It is no longer a requirement and issue estoppel may be asserted by non-parties (to the original litigation) in subsequent litigation, provided the party against whom it is sought to plead the estoppel *was* a party to the prior litigation and had a full and fair opportunity to defend. In so holding the American courts have unabashedly pronounced the death of mutuality. By contrast, Canadian (and to a lesser extent English) courts, while clinging to the notion that issue estoppel still requires mutuality, have in fact killed it. This certainly seems to be so if we accept Holmes' edict that the law is what the court will do in fact.³ The process of burying mutuality is a painful one, the resulting doctrine is confused, and in the process, the Canadian and English courts have often failed to adopt important

¹ O.W. Holmes, *The Path of the Law* (1897), 10 Harv. L. Rev. 457, at p. 461.

² "Some form of preclusive effect" is used here, descriptively, to include those cases where the courts have permitted prior judgments to be used as "*prima facie* evidence subject to rebuttal"; see *infra*, the text at footnotes 74, 81. (If these cases are excluded, the figure is 18 rather than 29). The two cases denying preclusive effect in favour of a non-party are *Gleeson v. J. Wippell & Co. Ltd.*, [1977] 1 W.L.R. 510, [1977] 3 All E.R. 54 (Ch. D.), (discussed *infra*, the text at footnote 54), and *Beaulieu v. McLaughlin* (1986), 68 N.B.R. (2d) 444 (N.B.C.A.) (discussed *infra*, in footnote 81). I have excluded from this calculation cases denying preclusion in circumstances where an American court would have refused to apply non-mutual issue estoppel, for example *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*, [1982] 2 Lloyd's Rep. 132 (C.A.), (discussed *infra*, the text at footnote 67), and the cases referred to in footnote 74.

³ *Supra*, footnote 1. Holmes' insight has become trite learning but is still honoured more in the breach than in the observance.

qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel.

This article first describes how and why the Americans abandoned mutuality. It then traces the steps taken by the Canadian and English courts in the same direction, and examines the current status of the doctrine in the United States. I will argue that the American approach is rational and essentially sound in policy terms and should be followed by Canadian courts. However, the doctrine is not free of difficulty, as the Americans have discerned. In the final part of this article, I suggest directions in which the law might be developed to alleviate these difficulties.⁴

In part this is a review article which draws heavily on the writings of others. However, I believe the subject matter is worthy of extensive analysis in the Anglo-Canadian context. It is complex and important, the literature is vast,⁵ the parameters of the problem and possible solutions often seem poorly understood by the Commonwealth judiciary and few Commonwealth academics seem to know about the doctrine or the literature. Moreover, the abandonment of mutuality is still much debated in the American literature and the promise it held has not been fulfilled in the United States as a solution to the problems of repetitive litigation.

⁴ See *infra*, Part VI.

⁵ In the United States there may well be more than 100 articles and notes on the subject. The early important literature includes: E.W. Cleary, *Res Judicata Reexamined* (1947-48), 57 *Yale L.J.* 339; G.C. Hazard, *Res Nova in Res Judicata* (1970-71), 44 *S. Cal. L. Rev.* 1036; B. Currie, *Civil Procedure—The Tempest Brews* (1965), 53 *Cal. L. Rev.* 25; B. Currie, *Mutuality of Collateral Estoppel—Limits of the Bernhard doctrine* (1956-57), 9 *Stan. L. Rev.* 281; J.W. Moore and T.S. Currier, *Mutuality and the Conclusiveness of Judgments* (1960-61), 35 *Tul. L. Rev.* 301; H. Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties* (1968), 68 *Col. L. Rev.* 1457; A.D. Vestal, *Preclusion/Res Judicata Variables: Parties* (1964-65), 50 *Iowa L. Rev.* 27. More recent periodical writings are referred to throughout this article. For American textbook treatment of this subject see, C.A. Wright, A.R. Miller and E.H. Cooper, *Federal Practice and Procedure*, para. 4463 (1981); J.H. Friedenthal, M.K. Kane and A.R. Miller, *Civil Procedure*, para. 14.9 (1985); C.A. Wright, *The Law of Federal Courts*, para. 72 (4th ed., 1983); F. James, Jr. and G.C. Hazard, *Civil Procedure*, para. 11.24 (3d ed., 1985). For a statement of the modern American law see, *Restatement (2nd), Judgments*, para. 29 (1982).

The Canadian literature is much more modest. The leading article is M.J. Herman and G.F. Hayden, *Issue Estoppel: Mutuality of Parties Reconsidered* (1986), 64 *Can. Bar Rev.* 437. See, also, T. Pinos, *Res Judicata Redux* (1988), 26 *Osg. Hall L.J.* 713; O.J.R. Smith, *The Legacy of Demeter: Pleading Highway Traffic Act Convictions in Civil Negligence Cases: Are There Any Limits?* (1989), 1 *C.I.L.R.* 75; G.D. Watson and M. McGowan, *Annual Survey of Recent Developments in Civil Procedure, in Ontario Supreme and District Court Practice* (1986, 1987, 1988 and 1989 editions); M.A. Gelowitz, *Bomac and O'Hara, Abuse and Abdication* (1989), 53 *Sask. L. Rev.* 163; T. Youdan, *Annotation* (1985), 21 *Estates and Trust Reports* 2.

The English literature is virtually non-existent. See J.K. Bentil, *Using Civil Action to Attack Criminal Determinations* (1983), 127 *Solicitors J.* 545; *Case Comment, Civil Action After Decision of Criminal Court* (1982), 46 *J. Crim. Law* 82.

The resolution of doctrinal difficulties, of course, takes place in the context of broader normative concerns that infuse and inform legal rules and policy. Although I will not explore the implications of this important understanding, it is essential to acknowledge the play and pull of competing visions of procedural justice.⁶ In short, this article aligns itself with the more expansive "public" view of litigation rather than the more traditional "private" conception.⁷ The conventional principle of non-mutuality draws its normative justification from a theory of corrective justice whose primary focus is the processing of individualized disputes in line with a restricted, individual and rights-centred ideology. On the other hand, the broader approach advocated in this article situates itself within a vision of law that is more sensitive to the need to ensure a more effective use of social resources and that recognizes the public consequences of any procedural regime. As such, this article is part of the growing trend within legal scholarship that favours broader rules of standing, intervention, class actions and the increased aggregation of litigation.⁸

I. *Issue Estoppel Defined*

Res Judicata is a form of estoppel and operates through the application of two doctrines or species: cause of action estoppel (called by the Americans "claim preclusion") and issue estoppel (called by the Americans "collateral estoppel" or "issue preclusion"). Cause of action estoppel simply means that where the legal claims and liabilities of two parties have been determined in a prior action, the *claims* may not be relitigated. If the cause of action was determined to exist, it is said to be *merged* in the judgment. If it was determined not to exist any subsequent action is *barred*.

Issue estoppel is an extension of the same rule of public policy, but it focuses not on claims or causes of actions, but on *issues*. It precludes relitigation of issues that a court has decided in a prior suit. If the cause of action involved in a subsequent proceeding is a separate and distinct one, cause of action estoppel will not apply. However, within a given cause of action there may be several issues that have to be adjudicated. If an issue has been determined in prior litigation, issue estoppel—even if the new litigation involves a different cause of action—will prevent relitigation of the issue already decided.⁹

⁶ For an excellent example of the integration of theoretical and practical considerations, see D. Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System* (1984), 97 Harv. L. Rev. 849.

⁷ See K. Roach, *Teaching Procedures: The Fiss-Weinrib Debate in Practice* (1990), 40 U.T.L.J. (forthcoming).

⁸ See A. Chayes, *The Role of the Judge in Public Law Litigation* (1976), 89 Harv. L. Rev. 1281; J. Resnik, *From Cases to Litigation* (forthcoming), and the literature cited *infra*, at footnote 164.

⁹ The classic statement of the distinction between cause of action estoppel and issue estoppel is that of Lord Diplock in *Thoday v. Thoday*, [1964] P. 181, at p. 197, [1964]

For issue estoppel to apply, certain requirements must be met. Three of the four requirements for the application of issue estoppel are uncontroversial and generally accepted in all jurisdictions: (1) the same issue must be involved in the initial and subsequent litigation; (2) the issue must have been actually litigated and determined in the first suit and its determination must have been necessary to the result in the litigation; and (3) the decision on the issue in question must have been final.

In the classic statements of issue estoppel in Anglo-Canadian law¹⁰ there is a fourth requirement—the only persons who can take advantage of the estoppel, or be bound by it, are the parties to the previous proceedings or their privies; no other person can take advantage of it or be bound by it because they were not a party to the previous proceeding. This privity requirement is also expressed in terms of *mutuality*: in order for there to be an estoppel the party must be bound by the estoppel, whichever way it goes. If, for example, A and B had been parties to litigation that established the authenticity of a signature, neither can relitigate the authenticity question in a subsequent suit between them, even in one involving a different claim or defence. But either can litigate the question in a suit with X, who was not a party to the first suit. Since X was not a party to the first suit, he is not bound by the decision therein (that is, he can disavow it if it is unfavourable to him) and consequently he cannot rely on it if it is favourable to him. Mutuality requires that he be bound whichever way the first case was decided. Since mutuality is lacking, X cannot bind either A or B to the earlier judgment.¹¹ While there is a general agreement as to the appropriateness of the first three requirements, the final requirement—mutuality—has been subject to considerable criticism which has led to its abandonment in most United States jurisdictions.¹²

The mutuality (or “same parties”) requirement—that favourable preclusion from a former judgment is only available to persons who would have been bound by any unfavourable preclusion—has always been recognized as being subject to the exception for “privies”. Over the years, and even today, courts have often manipulated the notion of privity to permit non-parties to preclude the relitigation of issues that earlier law suits have determined. At times the privity concept has assumed wondrous attributes of flexibility as courts attempt to apply their subjective sense

1 All E.R. 341, at p. 352 (C.A.). See also, *Blair v. Curran* (1939), 62 C.L.R. 464, at p. 532 (H.C. of Aust.).

¹⁰ For these requirements see, *Carl Zeiss Stiftung v. Raynor & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, at p. 935, [1966] 2 All E.R. 536, at p. 565 (H.L.); *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, (1974), 47 D.L.R. (3d) 544; G. Spencer Bower and A.K. Turner, *The Doctrine of Res Judicata* (2nd ed., 1969), pp. 181 *et seq.* For exceptions to the application of issue estoppel, see *infra*, footnote 123.

¹¹ The example is taken from J. Ratliff, *Offensive Collateral Estoppel and the Option Effect* (1988), 67 Texas L. Rev. 63, at p. 70.

¹² See Wright, Miller and Cooper, *op. cit.*, footnote 5, Vol. 18, para. 4464, note 3.

of fairness to situations that do not fit neatly within the traditional requirements for preclusion.¹³ While this technique has played an important role in avoiding the impact of mutuality, in this article I will concentrate, for the most part,¹⁴ on more direct assaults on the mutuality principle.

II. *Setting the Scene—The Abandonment of Mutuality in the United States*

To set the scene for a discussion of the English and Canadian case law and an analysis of the benefits and problems associated with the abandonment of mutuality, it is necessary to tell the story of the history of the abandonment of this requirement in the United States.¹⁵ So long as issue estoppel is confined by the mutuality/privity requirement its impact is quite limited. However, abrogating mutuality makes it possible for a single case's fact-finding to have a wide-ranging impact by effectively determining issues in later cases involving only one of the original parties.

A. *History of Abandonment*

The abandonment of mutuality in the United States involved many court decisions and the contribution of numerous commentators,¹⁶ but the story can be reduced ultimately to the contribution of two people—Jeremy Bentham and Mr. Justice Roger Traynor—and three landmark cases.

¹³ See W.S. Byassee, *Collateral Estoppel Without Mutuality: Accepting the Bernhard Doctrine* (1982), 35 *Vanderbilt L. Rev.* 1423; Wright, Miller and Cooper, *ibid.* A traditional, narrow definition of "privity" is one "who claims an interest in the subject-matter affected by the judgment through or under one of the parties, i.e., either by inheritance, succession or purchase; and this interest must have been acquired after rendition of the judgment": Comment, *Privity and Mutuality in the Doctrine of Res Judicata* (1925-26), 35 *Yale L.J.* 607, at pp. 608-609. Frequently much more expansive approaches are taken to the question of privity, even to the extent of holding that a finding of privity is no more than a finding that all of the facts and circumstances justify a conclusion that non-party preclusion is proper: see Byassee, *ibid.* For a discussion of the vagueness in English law of the concept of privity, see *Gleeson v. J. Wippell & Co. Ltd.*, *supra*, footnote 2, at pp. 514 (W.L.R.), 59 (All E.R.) (discussed *infra*, the text at footnote 54): "... the word 'interest' ... seems almost capable of meaning all things to all men; 'there is a dearth of authorities in England on the question of privies.' From such authorities as there are it is by no means easy to distil any principle." The Restatement (2nd), *Judgments* (Introduction, pp. 13-14) (1981), has abandoned the term privity and instead identifies types of non-parties who may be bound.

¹⁴ Canadian cases applying or manipulating the privity concept are discussed, *infra*, footnote 75. There is also a brief discussion of the American experience in this regard, *infra*, the text at footnote 113.

¹⁵ This is a story that has been told many times; see, for example, Herman and Hayden, *loc. cit.*, footnote 5; Byassee, *loc. cit.*, footnote 13; Ratliff, *loc. cit.*, footnote 11; Wright, Miller and Cooper, *op. cit.*, footnote 5. The account in the text draws heavily on each of these sources.

¹⁶ The account given here is an oversimplification. For accounts documenting how the United States courts struggled with the problem of mutuality, see Semmel, *loc. cit.*, footnote 5, and Byassee, *ibid.*

In the nineteenth century Jeremy Bentham had called the mutuality requirement illogical and ill-founded:¹⁷

There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he *was* a party, merely because his adversary was not. It is right enough that the verdict obtained by A against B should not bar the claim of a third party, C; but that it should not be evidence in favour of C against B, seems the very height of absurdity.

Bentham referred to the rule as "a curious one, the reason given for it still more so" and characterized it as "destitute of . . . [a] semblance of reason" and that it was a "maxim which one would suppose to have found its way from the gambling-table to the bench".¹⁸ It is to be noted that Bentham was concerned less with judicial efficiency than with what he saw as a superfluous and illogical prerequisite to collateral estoppel. He believed that the law entitled the litigant to only one day in court on a given issue and that thereafter the findings should bind him and prevent him from relitigating the same question.

The first landmark case on the abandonment of mutuality in the United States was the 1942 decision by Traynor J. in *Bernhard v. Bank of America*.¹⁹ In action #1, P (a beneficiary) had sued D1 (the executor) with respect to an estate and it was held that the deceased had made a gift during her lifetime to the executor of her bank account. Subsequently, in action #2, P (the beneficiary) sued D2 (the bank) to recover the amount in the bank account on the ground that the deceased had never authorized the executor to withdraw it. The court allowed the bank to invoke the first judgment as a collateral estoppel on the issue as to the ownership of the money, even though the bank would not have been bound had the earlier court determined that the deceased had never given the money to her executor. In so holding, Traynor J. explicitly rejected the requirement of mutuality, concluding that no satisfactory rationalization had been advanced for it. The benefits of *res judicata* found in "the sound policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy",²⁰ make it "unjust to permit one

¹⁷ J. Bentham, *Rationale of Judicial Evidence*, in J. Bowring (ed.), 7 Works of Jeremy Bentham 171 (1843). Bentham was referred to by Traynor J. in *Bernhard v. Bank of America Nat. Trust & Savings Assn.*, 122 P. 2d 892, 19 Cal. 2d 807 (S.C. Cal., 1942) (discussed *infra*, the text at footnote 19), and has been constantly referred to and quoted by American courts and commentators. Lord Denning referred to him in *McIlkenney v. Chief Constable of the West Midlands*, [1980] Q.B. 283, at pp. 317-318, [1980] 2 All E.R. 227, at p. 235 (C.A.) (discussed *infra*, the text commencing at footnote 55), and the above quoted passage appeared in the judgment of Goff L.J. in that case, *ibid.*, at pp. 327 (Q.B.), 243 (All E.R.).

¹⁸ *Ibid.*

¹⁹ *Supra*, footnote 17.

²⁰ *Ibid.*, at p. 894 (P.).

who has had his day in court to reopen identical issues by merely switching adversaries".²¹ He applied a three-part test for determining when preclusion is appropriate:²²

Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with the party to the prior adjudication?

Two points are to be noted about the *Bernhard* decision. First, on its facts it sanctioned only the *defensive* use of non-mutual issue estoppel, and as we will see, it is the subsequent approval of *offensive* non-mutual issue estoppel which is the more powerful, and problematic, development. Second, the abandonment of mutuality only permits the use of the estoppel against a person *who was a party to the original litigation*. While it was no longer necessary that there be the same parties to both the former and the present action, it *is* essential that the person against whom the estoppel is to be pleaded was a party to the earlier proceeding. To hold otherwise would simply be to deny subsequent plaintiffs their day in court and to deprive them of due process by binding them to a decision in which they never had an opportunity to participate.²³

In 1971 in *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*,²⁴ the United States Supreme Court joined the growing number of state jurisdictions that had abandoned the mutuality requirement where issue estoppel was sought to be used defensively, that is, in situations in which a (new) defendant sought to preclude an issue that the plaintiff had already litigated and lost against another party. The case concerned a patent infringement action in respect of a patent that had already been declared invalid in an earlier action brought by the plaintiff against another party. Citing the burden on judicial administration and the misallocation of resources resulting from relitigation of decided issues, the court followed *Bernhard* and rejected the mutuality requirement. But the court imposed the *caveat* that an earlier judgment could not preclude a losing party from

²¹ *Ibid.*, at p. 895 (P.).

²² *Ibid.*

²³ This is well articulated (though with the wrong result, I would submit) by Megarry V.-C., in *Gleeson v. J. Wippell & Co. Ltd.*, *supra*, footnote 2 (discussed *infra*, the text at footnote 54). In the United States this limitation is elevated to a constitutional requirement by reason of the "due process clause" of the Bill of Rights: see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (discussed *infra*, the text at footnote 27); J.R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Non-Parties to Prior Litigation* (1983), 63 Boston U.L. Rev. 383; E.P. Schroeder, *Relitigation of Common Issues: The Failure of Non-Party Preclusion and An Alternative Proposal* (1981-82), 67 Iowa L. Rev. 917. However, in the United States in recent years, attempts have been made to extend issue estoppel to non-parties to the earlier litigation; see the two articles just referred to and the text *infra*, at footnote 113. Techniques for extending "some preclusive effect" to non-parties are discussed *infra*, the text at footnote 132.

²⁴ 402 U.S. 313 (1971).

relitigating an issue if he could demonstrate that the first action failed to allow him a "fair opportunity procedurally, substantively, and evidentially to pursue his claim".²⁵

The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants, as was the case in *Blonder* itself.²⁶

Like *Bernhard*, *Blonder-Tongue* approved only this *defensive* use of non-mutual issue estoppel, and the court expressly refused to rule on its offensive application. However, eight years later, the Supreme Court took the remaining step and, in *Parklane Hosiery Co. v. Shore*,²⁷ it approved the *offensive* application of non-mutual issue estoppel, subject to certain conditions. Its affirmation of this final step in the abandonment of mutuality has been largely followed by state courts.²⁸ In *Parklane*, the Securities and Exchange Commission had obtained injunctive relief against the defendants in prior litigation on the ground that they had violated the securities law by false and misleading proxy statements in connection with a merger. In a subsequent private shareholders class action to recover damages arising from the false and misleading proxy statements, the court held that the plaintiffs could use the earlier determination to preclude the defendants from relitigating any of the issues decided against them.

The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc.*, now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due process and it should not be permitted to re-litigate the negligence issue.²⁹ However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

²⁵ *Ibid.*, at p. 333.

²⁶ This was the point that Megarry V.-C. failed to appreciate in *Gleeson v. J. Wipple & Co. Ltd.*, *supra*, footnote 2 (discussed *infra*, the text at footnote 54), which just like *Blonder* was a case of the plaintiff simply changing defendants in order to relitigate the issue.

²⁷ *Supra*, footnote 23.

²⁸ Wright, Miller and Cooper, *op. cit.*, footnote 5.

²⁹ See, for example, *United Airlines v. Weiner*, 335 F. (2d) 379 (9th Cir., 1964).

B. *United States Requirements for the Application of Non-Mutuality*

In *Parklane* the court articulated two exceptions to the offensive use of issue estoppel.

First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation³⁰ offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment".³¹ Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".³²

Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant;³³ or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.

³⁰ It encourages a plaintiff to join multiple defendants in one case when the claims against them involve common issues, because she can "lose" against non-parties (since they can make subsequent use of a judgment that is *unfavourable* to the plaintiffs, invoking *Blonder-Tongue*). But the plaintiff cannot "win" against non-parties: a judgment *favourable* to the plaintiff cannot be used against a non-party, because new defendants are entitled to relitigate the question when they are sued as they will not have yet had their day in court.

³¹ *Parklane Hosiery Co. v. Shore*, *supra*, footnote 23, at p. 330.

³² *Ibid.*, at p. 331. As we will see, *infra*, footnote 149, United States courts have not applied this condition of the rule strictly, with serious resulting problems.

³³ Here the court specifically acknowledged Brainerd Currie's famous example (*ibid.*, at pp. 330-331, note 14): "[A] railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover"; see, Currie, *loc. cit.*, footnote 5, at p. 304.

In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.³⁴

C. *Rationale for Non-Mutuality*

The purpose of issue estoppel is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication".³⁵ The basic arguments in favour of non-mutual preclusion are that it reduces the risk of inconsistent adjudication, spares one party the cost of ever litigating the issue, and protects the court system and other litigants against the delay and burdens entailed by relitigation. These are substantial values, which go far to support the argument that one full and fair opportunity to litigate an issue is enough.³⁶

But the abandonment of mutuality, and the use of offensive non-mutual collateral estoppel in particular, has its opponents³⁷ and there are policy arguments to the contrary.³⁸ The first is that the case for non-mutual preclusion is weaker than that which supports preclusion between the same parties. The need to foster repose and reliance on judgments that support the general doctrine of preclusion is greatly diluted in the context of non-mutual issue preclusion. Moreover, the argument that a party should not be "twice-vexed"—burdened with relitigating the same issues—is inapplicable to offensive non-mutual preclusion. The defendant in the second action usually resists the application of issue estoppel and is quite happy to be "twice-vexed", if this means that he or she will have a second chance

³⁴ A more detailed and very useful list of conditions for the application of non-mutual preclusion has been offered by the Restatement (2nd) of Judgments, *op. cit.*, footnote 5. However, it omits specific reference to some of the most searching inquiries that have been suggested by some cases, and which are discussed in Wright, Cooper and Miller, *op. cit.*, footnote 5.

³⁵ *Allen v. McCurry*, 449 U.S. 90, at p. 94 (1980).

³⁶ Wright, Miller and Cooper, *op. cit.*, footnote 5.

³⁷ As noted by H. Motomura, *Using Judgments as Evidence* (1986), 70 Minn. L. Rev. 979, at p. 1025, many commentators still have serious doubts about the wisdom of abandoning mutuality either generally (see, E.H. Greenebaum, *In Defense of the Doctrine of Mutuality of Estoppel* (1969-70), 45 Ind. L.J. 1; Moore and Currier, *loc. cit.*, footnote 5; E.E. Overton, *The Restatement of Judgments, Collateral Estoppel, and the Conflicts of Laws* (1976-77), 44 Ten. L. Rev. 927; Note: *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel* (1977-78), 76 Mich. L. Rev. 612), or the use of offensive non-mutual collateral estoppel in particular (see, J.F. Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, [1982] *Ariz. St. L.J.* 45; J.F. Flanagan, *The Efficiency Hypothesis and Offensive Collateral Estoppel: A Response to Professor Callen*, [1983] *Ariz. St. L.J.* 835; Ratliff, *loc. cit.*, footnote 11).

³⁸ Wright, Miller and Cooper, *op. cit.*, footnote 5, para. 4464, p. 582.

at a better result. In the final analysis it is the justice system, and other litigants within the system with unrelated disputes, that benefit from non-mutual preclusion's avoidance of duplicative litigation.³⁹

A second argument against non-mutual preclusion points to the fact that the first determination of an issue is not always correct, and refers to special dangers peculiar to non-mutual preclusion.⁴⁰ Experienced litigators know that any decision may be strongly affected by the identity of the parties. For example, a badly disfigured survivor of an accident may have a much better chance of recovery than the estate of someone killed in the accident. Moreover, chance may not determine the identity of the plaintiff in the first action, since plaintiffs' lawyers may see to it that the most sympathetic claim is tried first.⁴¹ This argument rejects the notion that "fact finders compartmentalize their decision making and ignore 'irrelevant' information that one case is as good as another for establishing the liability facts for future cases. . . . The damages proof often spills over into liability issues so that a case weak on liability is saved if the damages are strong and vice-versa".⁴² That the first court may be ignorant of the potential impact of its findings is seen as aggravating these difficulties. "No one involved in the first case can be sure whether its outcome will have collateral estoppel effects."⁴³ The court "may yield to the temptation to make a

³⁹ Ratliff, *loc. cit.*, footnote 11, at p. 100.

⁴⁰ While we object to relitigation, this is not because we believe in the first case the "real truth" was found. We focus on the perception of fairness rather than on ultimate truth or even actual fairness. (The inadequacies of an adversarial trial, particularly a jury trial, to determine the objective truth have often been noted. See, for example, M.E. Frankel, *The Search for Truth: An Umpireal View* (1974-75), 123 U. Pa. L. Rev. 1031, at pp. 1035-1041; J. Frank, *Courts on Trial* (1950), pp. 85-86, 93, 94). For the "proof of the pudding", witness Parker J.'s attempt to avoid repetitive trials in asbestos cases by having five different juries hear simultaneously the same liability evidence in five cases tried together by the same lawyers in one courtroom, with a view to using the outcome as a basis for non-mutual preclusion. Despite the procedural uniformity, the juries' findings were inconsistent and "strikingly divergent". See M.D. Green, *The Inability of Offensive Collateral Estoppel to Fulfil Its Promise: An Examination of Estoppel in Asbestos Litigation* (1984-85), 70 Iowa L. Rev. 141. We rationalize the possibility of such divergent outcomes by saying that, if the procedures were fair, relitigation would be unlikely to establish a more correct outcome than did the first suit. See, *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, *supra*, footnote 24, at pp. 331-332. If we were to focus exclusively on truth-finding and the fear that action #1 may not have determined it, we would have to abandon *res judicata* completely—even between the same parties. The result would be chaos for, even under existing rules, the volume of case law indicates that there are plenty of parties willing to attempt to relitigate. Our preference for perceived fairness over objective truth must be of concern, however, in some situations. See, for example, *Birmingham Bombers*, and the discussion, *infra*, the text at footnote 55.

⁴¹ Wright, Miller and Cooper, *op. cit.*, footnote 5, para. 4464, p. 583.

⁴² Ratliff, *loc. cit.*, footnote 11, at p. 89.

⁴³ *Ibid.*, at p. 93.

sympathetic award, even if the liability proof does not quite justify it, if it appears that the defendant can easily afford to pay".⁴⁴

A third argument questions the contribution of non-mutual preclusion in preventing the legal system from embarrassing itself through inconsistent determinations. Although it "somewhat reduces the potential for inconsistent decisions",⁴⁵ it in no way ensures this because (a) it is unavailable where its application would be unfair to the defendant, and (b) it does nothing to prevent relitigation of the same question if the plaintiff loses the first case.⁴⁶

Even accepting the merit of these arguments, offensive non-mutual preclusion remains justified because of (a) "its contribution to judicial efficiency"⁴⁷ (sparing one party the cost of ever litigating the issue and protecting the court system and other litigants against the delay and burdens entailed by relitigation) and (b) its ability to bring about at least a partial reduction of inconsistent decisions. And surely these are sufficient justifications.⁴⁸ To be acceptable, however, the doctrine must ensure fairness to the defendant by a careful determination that, in the first action, the defendant had a full and fair opportunity to litigate and that, therefore, to apply preclusion would be fair. Moreover, the doctrine must be administered in such a way as to disarm the "option effect"⁴⁹ (the "free-riderism")⁵⁰ that it offers to "wait and see" plaintiffs. (How this might be done is discussed *infra*, in Part VI.).⁵¹

III. *The English Experience*

The traditional English rule requiring the same parties/mutuality for the application of issue estoppel was invoked and rigourously applied by the House of Lords in *Carl Zeiss Stiftung v. Raynor & Keeler Ltd. (No. 2)*,⁵²

⁴⁴ *Ibid.*, at p. 94, observing that a "long-recognized exception to collateral estoppel exists for findings that result from compromise verdicts. See Restatement (Second) of Judgments, para. 29(5) (1980). Courts have not paid much attention, however, to the idea that juries might make a modest redistribution of wealth in a sympathetic case, but not if they thought that a judgment could break the bank".

⁴⁵ *Ibid.*, at p. 100.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*; Wright, Miller and Cooper, *op. cit.*, footnote 5, para. 4464.

⁴⁸ In the United States most criticisms of the doctrine come from commentators rather than from courts. Courts undoubtedly have a self-interest in avoiding relitigation, but there is also a societal interest in avoiding wasteful relitigation.

⁴⁹ See Ratliff, *loc. cit.*, footnote 11.

⁵⁰ See L.C. George, Sweet Uses of Adversity: *Parklane Hosiery* and the Collateral Class Action (1979-80), 32 Stan. L. Rev. 655.

⁵¹ *Infra*, p. 656.

⁵² [1967] 1 A.C. 853, [1966] 2 All E.R. 536 (H.L.). The facts and legal issues in this case were complex, but for our purposes the essential facts were that in previous litigation in West Germany between the East German Council of Jera and a West German

and to document the English contribution to the abandonment of mutuality we need to look at subsequent cases.⁵³ As we will see, in Canada there has been a plethora of cases in recent years on the issue of mutuality. By contrast, the English cases are few in number: indeed, there appears only to be six of them.

In *Gleeson v. J. Wippell & Co. Ltd.*,⁵⁴ on very appealing facts, Megarry V.-C. refused to abandon mutuality and adopt defensive non-mutual issue estoppel (or even to find privity). In prior litigation, Gleeson (the present plaintiff) had sued a shirt manufacturer, D. Ltd., and had been unsuccessful in her attempt to establish that D. Ltd. had infringed her copyright in her drawings of a shirt with a clerical collar attached. She then brought an action against W. Ltd., who had not been a party to the original action, but was the company that had supplied D. Ltd. with the very shirt design which had been in issue in the first action. W. Ltd. moved to strike out the statement of claim as an abuse of process on the ground that the central issue raised by the plaintiff in the second action (that is, whether W.'s shirts were copies of her drawings), had already been litigated and determined in the action against D. Ltd. While observing that the English authorities were quite unclear as to what constituted privity for the purpose of issue estoppel, Megarry V.-C. attempted to resolve the problem of privity by invoking mutuality: if the defendant in the second action was really in privity with the defendant in the first action, would they have been bound in the second action by a decision in favour of the plaintiff in the first action? It would be most unjust, he observed, to so preclude W. Ltd. by a decision reached in a case in which it was not a party and in which it had no voice. In the end he concluded that neither issue estoppel nor abuse of process was applicable. Thus the plaintiff was allowed to relitigate the identical issue litigated in the first action by the simple device of switching defendants (the very thing which the United States courts in *Bernhard* and *Blonder-Tongue* had refused to permit).

company as to who owned the assets and name of Carl Zeiss, it had been decided that the Council of Jera did not have title. Subsequently, in English proceedings the West German company challenged the authority of English solicitors who had, on instructions of the Council of Jera and in the name of Carl Zeiss, commenced a passing off action in England against the West German company. Although by challenging the authority of the plaintiff's solicitors the West German company was simply asserting issue estoppel against the Council of Jera, it was held that since the respondent to the interlocutory application was the English firm of solicitors, and they were not parties or privies to the prior adjudication in West Germany, the issue estoppel argument failed. See, Herman and Hayden, *loc. cit.*, footnote 5, at pp. 443-444.

⁵³ For a much earlier case forbidding a defendant from relitigating an issue which had been decided between him and a different party, see *Reichel v. MacGrath* (1889), 14 App. Cas. 665 (H.L.).

⁵⁴ *Supra*, footnote 2. The second action never went to trial and was settled.

By far the most important English decision is the *Birmingham Bombers* case.⁵⁵ The plaintiffs, who were alleged to be members of the IRA, had been previously convicted of the horrible bombing of a hotel which caused the death of numerous people. Subsequently they brought a damage action against the police for allegedly beating them during their interrogation. During the course of the earlier criminal trial the accused had specifically raised this issue by alleging that their confessions had been beaten out of them, and both the judge (on the *voir dire*) and the jury had rejected this contention and held the confessions to be voluntary. In the subsequent civil action the police argued that there was an issue estoppel arising from earlier criminal proceedings. In the Court of Appeal, Lord Denning based the dismissal of the action on the ground of non-mutual issue estoppel, holding that, for issue estoppel to apply, it should no longer be necessary, as required by traditional doctrine, that there be the same parties in both the former and the present action. What was essential, he held, is that the person against whom the estoppel was now sought to be pleaded (that is, the present plaintiff) was a party to the earlier proceeding. In so doing Lord Denning referred to, and specifically embraced, the doctrine of non-mutual issue estoppel as developed in the United States.⁵⁶ On the question of abandoning mutuality, Goff L.J. dissented, insisting that mutuality and privity must remain, but holding that the action should be dismissed on the grounds of "abuse of process" arising from the fact that the very issue that the plaintiffs sought to raise had already been decided against them in the prior proceeding on the criminal standard of proof beyond a reasonable doubt. In his reasons Lord Denning anticipated Goff L.J.'s invocation of abuse of process, and stated that "the real reason why the claim was struck out was because the self same issue had previously been determined *against*

⁵⁵ *McIlkenney v. Chief Constable of West Midlands Police Force*, *supra*, footnote 17, affirmed *sub nom Hunter v. Chief Constable of West Midlands*, [1982] A.C. 529, [1981] 3 All E.R. 727 (H.L.).

⁵⁶ The case before him was one of defensive preclusion and the American cases referred to by Lord Denning were all cases involving defensive issue estoppel. But Lord Denning did not so limit his analysis and he specifically referred to, illustrated and approved of the offensive use of non-mutual issue estoppel; *ibid.*, at pp. 320-321 (Q.B.), 238 (All E.R.).

The judgment is classic Lord Denning, analytically powerful, provocative and groundbreaking, at least for Commonwealth law. Stylistically he was in top form. His statement of the facts was in his now famous staccato. It drew from Lord Diplock the comment "to paraphrase it would only be to spoil it, to improve upon it would be impossible". Introducing his discussion of the law, Lord Denning makes brilliant use of metaphor, referring to the "house called Estoppel", with "many rooms" and "rickety chairs". Moreover, he got his "final revenge" by being able to state that "[b]eyond doubt, *Hollington v. Hewthorn* [1943] K.B. 587 was wrongly decided" (see *infra*, footnote 78). He had, of course, been losing counsel in the case. (But we see the further comments made by Lord Denning, referred to in footnote 58, *infra*).

⁵⁷ *Ibid.*, at pp. 322 (Q.B.), 239 (All E.R.).

the party by a court of competent jurisdiction. What is that but issue estoppel?"⁵⁷ Lord Denning continued:⁵⁸

The truth is that as of the date of those cases the doctrine of issue estoppel had not emerged as a separate doctrine. So the courts found it necessary to put it on "abuse of the process of the court." Now that issue estoppel is fully recognized, it is better to reach the decision on that ground: rather than on the vague phrase "abuse of the process of the court." Each doctrine is based on the same considerations and produces the same result.

On appeal, the House of Lords declined in the circumstances to accept Lord Denning's reasons and instead it rested its decision on the "vague" concept of abuse of process.⁵⁹ Lord Diplock stated:⁶⁰

Nevertheless, it is my own view, which I understand is shared by all of your Lordships, that it would be best, in order to avoid confusion, if the use of the description "issue estoppel" in *English law, at any rate* (it does not appear to have been adopted in the United States), were restricted to that species of estoppel *per rem judicatam* that may arise in civil actions between the same parties or their privies. . . .

As with any court decision, and particularly significant ones, the question becomes: how is the decision in *Hunter* to be interpreted? Broadly or narrowly? A broad reading is that in striking out the plaintiff's action as an "abuse of process" the court, in effect, embraced the doctrine of

⁵⁸ *Ibid.* Just as hard cases make bad law, easy cases with "attractive" facts may give the impetus to bold developments. It seems reasonably clear that in the *Birmingham Bombers* case, the plaintiffs were seen as being "bad persons"—vicious murderers as well as process abusers—who should be stopped. (See Lord Denning's righteous comment, *ibid.*, at pp. 323-324 (Q.B.), 240 (All E.R.), that this "case shows what a civilized country we are", since these were men who had been found guilty of "most wicked murder", who had in their evidence been guilty of "gross perjury", yet the state "lavished large sums on their defence" and continued "to lavish large sums on them—in their actions against the police. . . . It is a scandal that it should be allowed to continue"). The circumstances in *Demeter v. British Pacific Life Insurance Co.* (1984), 13 D.L.R. (4th) 318, 48 O.R. (2d) 266 (Ont. C.A.), were similar. Note also that in *Parklane* the persons estopped had been found to have engaged in at least illegal if not criminal, conduct.

⁵⁹ *Hunter v. Chief Constable of West Midlands*, *supra*, footnote 55. It seems quite wrong to treat the decision in *Hunter* as a *considered* rejection of Lord Denning's approach to the abandonment of mutuality. At the outset of the argument, Lord Diplock encouraged the appellants to concentrate on abuse of process rather than issue estoppel. While the American cases were argued and discussed in the judgments, they were conspicuously absent from both the argument and the judgments in the House of Lords. Lord Diplock stressed, *ibid.*, at pp. 540 (A.C.), 732 (All E.R.), that the argument in the case had been directed to the question of whether Goff L.J.'s judgment—which turned on abuse of process—was sustainable. After the argument of the plaintiff, counsel for the police were not even called upon. In his reasons Lord Diplock stated that if what the plaintiff was seeking to do was an abuse of process, whether it also qualifies to bear the label "issue estoppel" was a matter "not of substance but of semantics" and since it could not possibly affect the outcome of the appeal, it did not justify the public expense that would be involved in considering the matter. In short, the House of Lords did not deal with Lord Denning's arguments in any detail, and indeed it did not encourage or permit that issue to be argued on the appeal.

⁶⁰ *Ibid.*, at pp. 540-541 (A.C.), 733 (All E.R.).

"defensive non-mutual issue estoppel" but with a different name tag. The crucial passage from Lord Diplock's judgment is the following:⁶¹

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

While it may be predicated with some confidence that ultimately *Hunter* will be read broadly, even in England,⁶² Lord Diplock likely intended a narrower reading.⁶³ The narrow reading is that abuse of process does not arise simply from the fact that, in subsequent litigation, a party raises a question already decided in earlier litigation, but requires that the party seeking to relitigate has an "ulterior motive" in the sense that it is not his or her genuine purpose to obtain the relief sought in the second action, but some collateral purpose. As Lord Diplock made clear this was certainly the situation in *Hunter*. The Home Office was a co-defendant in the case and had accepted liability for the assaults on the plaintiffs by the prison officers, which had occurred after the statements to the police had been made. The plaintiffs were entitled to have their damages assessed against the Home Office but, instead, they continued the action against the police. Lord Diplock was explicit in his view that the purpose of the attempt at re-litigation was merely to mount a collateral attack on the prior decision.⁶⁴

⁶¹ *Ibid.*, at pp. 541 (A.C.), 733 (All E.R.).

⁶² A number of Canadian courts have given *Hunter* a broad reading. See the cases discussed, Part IV, *infra*, p. 643; in particular *Holt v. Ashfield* (1986), 77 N.B.R. (2d) 121 (N.B.Q.B.); *Bomac Construction Limited v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.). For a broad English reading, see *North West Water Authority v. Binnie and Partners* (1990), 140 New L.J. 130 (Q.B.), discussed *infra*, the text at footnote 70.

⁶³ For a subsequent narrow English reading of the case, see *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*, *supra*, footnote 2 (discussed *infra*, the text at footnote 67). For similar narrow readings of the *Hunter* principle in Canada, see, for example, *Taylor v. Baribeau* (1985), 21 D.L.R. (4th) 140, 51 O.R. (2d) 541 (Ont. Div. Ct.) (discussed *infra*, in footnote 89), and *Re Del Core and Ontario College of Pharmacists* (1985), 19 D.L.R. (4th) 68, 51 O.R. (2d) 1 (Ont. C.A.) (discussed *infra*, in footnote 87).

⁶⁴ The Birmingham Bombers have continued a long struggle to have their convictions reversed through other means. See B. Hilliard, *Soldiers of Nothing* (1990), 140 New L.J. 160. For an extensive and critical analysis of the treatment of the Birmingham Bombers, see C. Mullen, *Error of Judgment: The Truth About the Birmingham Bombers* (1990). Subsequent to their civil action, the case was investigated by a different police force whose findings were considered by the Court of Appeal in January, 1987 at which time the court upheld the convictions. In March, 1990 the Home Secretary ordered that the police inquiry into the case be reopened to examine new evidence which might provide grounds for further reference to the Court of Appeal. The new evidence includes revelations that several members of the now disbanded West Midlands Serious Crime Squad (which had investigated the Bombers) extracted confessions from men, allegedly by brutality. See, *The Guardian*, March 22, 1990, p. 1. Subsequently, see the *Globe and Mail*, September 3, 1990, P. A13. The Home Secretary again referred the case to the Court of Appeal on the ground that new evidence "might be thought to cast doubt on the safety of the convictions",

Of the four English cases subsequent to *Hunter*, two are of minor significance. In *Tebbutt v. Haynes*,⁶⁵ Lord Denning stuck to his "non-mutual guns" in a case decided before the appeal in *Hunter*, and in *Somasundaram v. M. Julius Melchior & Co.*⁶⁶ the Court of Appeal unnecessarily invoked *Hunter* in an action by a disgruntled convicted plaintiff who sued his solicitor. However, the other two cases are worthy of some analysis.

*Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*⁶⁷ presented the court with a case of offensive non-mutual issue estoppel

notwithstanding that the pending police inquiry was not expected to be completed for several months.

These events may seem to make it ironic to use their civil case as a major basis for an argument for issue preclusion, particularly in light of the ultimate acquittal of the "Guildford Four", (whose bombing convictions were referred to and quashed by the Court of Appeal after they had spent fifteen years in prison) and the release of the "Maguire Seven" (whose convictions for operating a bomb factory were declared by the Director of Public Prosecutions to be unsafe after the accused had spent ten years in jail). See S. Edwards, *From Scapegoats to Sacrificial Lambs: The Guildford Four Affair* (1989), 139 New L.J. 1449. But see the comments, *supra*, footnote 40. In cases like these, to avoid the chaos of relitigation, we must leave reconsideration of unsound verdicts to the type of rehearings used in those cases (satisfactory or unsatisfactory as they may be), rather than to private attempts at collateral attack.

⁶⁵ [1981] 2 All E.R. 238 (C.A.), (following her husband's disappearance, a wife's claim to the matrimonial home was dismissed, the court holding that the husband's mother owned the house. In a subsequent action by the mother against the husband and wife for a declaration of ownership, the wife counterclaimed for an order that she owned the house; applying *McIlkenney*, Lord Denning held that issue estoppel precluded her counterclaim).

⁶⁶ [1988] 1 W.L.R. 1394, [1989] 1 All E.R. 129 (C.A.), and see J.A. Jolowicz, Comment, [1989] Camb. L.J. 196. A plaintiff who had pleaded guilty to a criminal offence and been convicted, sued his solicitors for negligence in pressuring him to plead guilty. The court held that, because the action would impugn the correctness of the final decision of the criminal court, the plaintiff's claim necessarily involved a collateral attack on the correctness of this conviction, and it should be struck out as an abuse of process. It is submitted that this holding was both unnecessary and unsound, though this would be more readily apparent to somebody who comes from a jurisdiction which does not recognize a barrister's immunity, such as Canada; see *Demarco v. Ungaro* (1979), 95 D.L.R. (3d) 385, 21 O.R. (2d) 673 (Ont. H.C.). If the case is correct it would stop even a *bona fide* plaintiff who wanted to prove that as a result of (clear) negligence on the part of his solicitor he lost his case. Surely the case is distinguishable from *Hunter*. The alternative holding of the court in *Somasundaram* was the appropriate way to deal with the problem facing the court. It held that on the basis of the substantial affidavit evidence filed the plaintiff's claim should be struck out as being vexatious and frivolous. This holding, which was in effect a holding that summary judgment should go against the plaintiff because he was bound to fail on the facts at trial, is the proper way to deal with the problem presented by this case. There was no need to invoke the unruly doctrine of abuse of process in order to dispose fairly of the case.

⁶⁷ *Supra*, footnote 2. The subsequent history of the two actions is of some interest. Action #2, *Bragg*, went to trial but was settled; see, [1984] 1 Lloyd's Rep., at p. 489 (C.A.). Subsequently, the decision reached at trial in action #1 (that is, defendants were not liable because no misrepresentation) was reversed on appeal; see, *C.T.I. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*, [1984] 1 Lloyd's Rep. 476 (C.A.).

which it rejected (a) on the grounds of a narrow reading of *Hunter*, and (b) on further grounds which would also have led an American court to reject issue estoppel. The case concerned two actions for millions of dollars against insurers arising out of contracts of insurance on containers leased to shipping lines. Central to the case were allegations of misrepresentations in the placing of the insurance. Two actions were brought against a common defendant, Oceanus, which moved to have the two actions consolidated. This was successfully opposed by the plaintiffs in both actions. Action #1 then went to trial and Oceanus failed in its defence that misrepresentations had been made by an insurance agent in placing the insurance with Oceanus. In the second action the defendant sought to raise the same defence, and the plaintiffs moved to have the defence struck out as an abuse of process. Reading *Hunter* narrowly, the court concluded that Oceanus was not pursuing some ulterior or collateral purpose in putting forth the same defence, but had the genuine purpose of attempting to defeat the liability asserted against them.⁶⁸

But it is the court's handling of the other issues which is of greater interest, since they mirror two of the exceptions to the application of non-mutual issue estoppel enunciated by the United States Supreme Court in *Parklane*. By opposing consolidation of the two actions the plaintiff in the second action was a "wait and see" plaintiff. That the defence of misrepresentation would have to be relitigated was directly attributable to the plaintiff's conduct. "The overriding consideration is that Oceanus have done nothing to bring this unfortunate situation about; indeed, they have sought to avoid it".⁶⁹ The further ground for rejecting the plea of estoppel here was that the second action would provide the defendant with a significant procedural advantage unavailable to it in the first action. The court observed that at the first trial Oceanus had had to call a number of Lloyd's underwriters (the plaintiffs in the second action) on *subpoena* as their own witnesses, and under the English practice they were not permitted to cross-examine them. The evidence of these witnesses was highly material to the defence pleaded, and in the second action the defendant would be entitled to cross-examine these witnesses.

The last English case, the recent decision by Drake J. in *North West Water Authority v. Binnie & Partners*,⁷⁰ is of interest because of comments in the judgment, rather than because non-mutuality was actually involved. At issue was a mass accident—the Abbeystead disaster—in which six people were killed and thirty-eight injured—in an explosion of methane gas in

⁶⁸ However, it is interesting to note that the court would not be drawn into defining what is an abuse of process. Kerr L.J. stated (*ibid.*, at p. 137), that it "would be wrong to attempt to categorize the situations which might constitute abuse of process". Sir David Cairns, said (*ibid.*, at p. 138), "it would be dangerous to attempt to define fully what are the circumstances which should lead to a finding of abuse of process".

⁶⁹ *Ibid.*, at p. 138.

⁷⁰ *Supra*, footnote 62.

a water pumping system designed by Binnie. In an earlier action (action #1), brought by the victims, and in which both Binnie and the Water Authority were defendants, it was held that Binnie was negligent and solely responsible for the explosion. In the *North West Water Authority* case the Water Authority sued the engineers for £2,000,000 for property damage caused by the explosion and it moved to strike out the engineers' denial of negligence on the grounds that issue had already been decided in the earlier action, arguing both issue estoppel and abuse of process. Binnie's position was that neither doctrine should apply because in the first action (a) they had litigated with the plaintiffs (not with the Water Authority), and (b) they had not pleaded contributory negligence against the Water Authority, and they now intended to do so.

In action #1, the Water Authority had alleged negligence against Binnie, although Binnie had made no allegations of negligence against the Water Authority. In that action the trial judge had found both defendants at fault and had apportioned liability between them, but the Court of Appeal held Binnie to be solely at fault. Drake J. concluded that there was no doubt that in action #1 the issue of negligence had been litigated and decided between the Water Authority and Binnie.

In his reasons, Drake J. noted that the authorities revealed two schools of thought on the scope of issue estoppel. The narrow approach limits the doctrine to the same parties (citing *Hunter*), while the broad approach (citing Lord Denning in *McIlkenney*) holds that the true test of issue estoppel is whether the party seeking to put forward some issue had already had that issue decided against him by a prior court, even if the parties to the two actions are different. He then proceeded to hold that here the attempt by Binnie to relitigate the issue already decided was an abuse of process. Alternatively, he held that Binnie was also estopped by issue estoppel, and stated that in his view the broader approach to issue estoppel was the correct one, that is, even as against a non-party, issue estoppel should apply where the present defendant had already had a full and fair opportunity of litigating the issue.

Given the actual facts of the case, it can easily be argued that, properly analyzed, it involved no question of non-mutuality at all, since the relevant parties were parties to both actions. Hence any observations about non-mutuality were pure *obiter*. However, it represents another judicial vote in favour of non-mutual preclusion and, if Drake J. is to be taken at his word, had the second action been brought by the remaining victims against Binnie, he would have held that issue estoppel applied.⁷¹

⁷¹ Binnie complained that at the earlier trial they had been refused leave to use in evidence an adverse report prepared by the Water Authority because, *inter alia*, of the lateness of the request to do so, and that they intended to use the report in the second action. This suggests an argument that the second action would afford an important procedural advantage not open to the defendant in action #1 (see *Bragg v. Oceanus Mutual*, *supra*,

IV. The Canadian Experience

A. Introduction and Summary

It is possible to argue about the present and future direction of the English law of issue estoppel. However, the direction of Canadian law seems clear. If mutuality is not a dead letter, it appears at best to be in its death throes. If law is what the courts do in fact, then in Canada all that remains to be done now is to give mutuality the ceremony of a decent burial (a step which is complicated by *obiter* in the Supreme Court of Canada).⁷² Since the mid seventies there have been no less than twenty-three cases permitting a non-party to obtain "some preclusive effect"⁷³ from a prior judgment in subsequent litigation with persons who were parties to the former judgment.⁷⁴

footnote 2, discussed in the text at footnote 67). But the point is far from clear because the trial judge also stated that the report was "not necessary for the fair determination of the issue between the parties". Moreover, it is unclear that such a procedural difference is a relevant consideration where the subsequent litigation is between the *same parties*.

⁷² A difficulty facing lower Canadian courts in resolving the mutuality problem logically and in the way they seem to wish to go, is the decision of the Supreme Court of Canada in *Angle v. Minister of National Revenue*, *supra*, footnote 10. There, the court set forth the traditional requirements for the application of issue estoppel, including the requirement that the two proceedings be between the same parties or their privies. However, the court's statement was a general one and the case itself did not involve any problem of different parties. Although the case was not about mutuality, it is frequently referred to by lower courts as being binding on them as to the requirement of "same parties". This has had an unfortunate and distorting effect on the handling of the problem by lower courts. An appeal is currently pending before the court in the case of *Altobelli v. Pilot Insurance Co.* (1987), 19 C.P.C. (2d) 5 (Ont. Dist. Ct.), varied on appeal (1989), 34 C.P.C. (2d) 193 (Ont. C.A.) (discussed *infra*, in footnotes 75 and 81), which will likely address this issue.

⁷³ *Supra*, footnote 2.

⁷⁴ Indeed over this period there appears to be only one case refusing some preclusive effect in favour of a non-party against persons who were parties to the former proceeding in circumstances where American courts would have granted non-mutual issue estoppel: see *Beaulieu v. McLaughlin*, *supra*, footnote 2 (discussed *infra*, in footnote 81). But see the cases referred to *infra*, footnote 89.

In several cases, the courts have refused to permit issue estoppel to be pleaded against a person who was *not* a party to the original proceeding, results which are fully consistent with an abandonment of mutuality, since to decide otherwise would be to deprive a party of his or her day in court. See, *Kraemer v. Lindsay Specialty Products Ltd.* (1986), 8 C.I.P.R. 84 (Fed. T.D.) (in prior proceedings between P and D1, P's patent had been declared invalid; in the subsequent patent infringement action by P against D2, P claimed that by reason of the prior litigation, there was an issue estoppel with regard to the validity of its patent; the court, quite properly, rejected the argument); *Bank of Montreal v. Kuzma* (1984), 46 C.P.C. 303 (Sask. Q.B.) (in a matrimonial property action between husband and wife it was held that the husband should be liable for his wife's promissory note to the bank; in a subsequent action by the bank to recover on the note from the wife she was not permitted to plead issue estoppel as against the bank).

Canadian courts have resorted to three distinct techniques to achieve this objective: (1) abuse of process has been used as the equivalent of defensive non-mutual issue estoppel; (2) a form of offensive non-mutual "preclusion" has been achieved through using prior adjudications as "*prima facie* evidence subject to rebuttal"; and finally (3) abuse of process has been used to establish offensive non-mutual issue estoppel. In addition to these techniques courts have also resorted to circumventing the mutuality problem through the application or manipulation of the privity concept.⁷⁵

B. Defensive Non-Mutual Estoppel Through the Use of Abuse of Process

The House of Lord's "abuse of process" doctrine found its way into Canadian law in *Demeter v. British Pacific Life Insurance Co.*⁷⁶ Demeter had been convicted of murdering his wife by arranging for her to be killed by persons "unknown". Subsequently, Demeter brought an action to recover on life insurance policies he held on his wife. The Ontario Court of Appeal, in a brief judgment which affirmed the decision at first instance, had little difficulty in concluding that the action should be struck out as an "abuse of process" because the real purpose of the action (as Demeter had frankly admitted on his pre-trial examination for discovery) was to attempt to retry the issue of Demeter's guilt. Neither at first instance nor in the Court of Appeal was there any discussion, either pro or con, of the doctrine of non-mutual issue estoppel, and the decision rested squarely on the narrow principle enunciated in *Hunter*. (Indeed, neither party had an interest in arguing for the existence of the doctrine of non-mutual issue estoppel in *Demeter*: it would not have helped Demeter, and the insurance companies had an easier case arguing abuse of process). However, the *Demeter* case represented a lost opportunity to embrace Lord Denning's reasoning in *McIlkenney*.

⁷⁵ *Grewal v. Small* (1985), 69 B.C.L.R. 121 (B.C.S.C.) (employer of truck driver found to be in privity with the employee); *Richards v. Continental Casualty Co.* (1986), 47 Alta. L. Rep. (2d) 44 (Alta. Q.B.), affirmed (1987), 53 Alta. L. Rep. (2d) 76 (Alta. C.A.) (insurer found to be in privity with its insured); *Altobelli v. Pilot Insurance Co.*, *supra*, footnote 72 (plaintiff's own disability insurers held to be in privity with the tortfeasor defendant originally sued by plaintiff; varied on appeal on the ground that it was premature at the interlocutory stage to determine the question of issue estoppel and the case should proceed to trial; an appeal in this case is presently pending in the Supreme Court of Canada); *Vautour v. Province of New Brunswick* (1985), 62 N.B.R. (2d) 142 (N.B.C.A.) (Federal and Provincial Crown held to be in privity on the theory that the Crown is indivisible); but see, *Verlysdonk v. Premier Petrenas Construction Co. Ltd.* (1987), 39 D.L.R. (4th) 715, 60 O.R. (2d) 65 (Ont. Div. Ct.) (argument that plaintiff's home owner insurer and the tortfeasor who injured the plaintiff were in privity, rejected in circumstances where preclusion was, in any event, inappropriate).

⁷⁶ *Supra*, footnote 58.

At first instance⁷⁷ Osler J. had followed the lead of Lord Diplock (in *Hunter*) in holding that *Hollington v. Hewthorn*⁷⁸ was wrongly decided and did not represent the law in Ontario and that:⁷⁹

...if the action is to go forward, proof of the conviction of the plaintiff for the murder of his wife may be adduced in evidence and, if this is done, should be regarded as *prima facie* proof of that issue, subject to rebuttal by the plaintiff on the merits.

In affirming the judgment at first instance, the Court of Appeal agreed with the conclusion that *Hollington* is not the law in Ontario, but made no specific reference to whether a previous conviction should go in as *prima facie* proof. (As we will see, in subsequent Canadian cases Osler J.'s rejection of *Hollington* has led to another route for giving "estoppel effect" to earlier judgments, through the device of permitting them to be used as "*prima facie* proof subject to rebuttal").

In numerous cases the courts have permitted *Demeter*-type defensive use of a prior judgment by a non-party against a party to the former proceeding who had litigated and lost. In some of the cases the courts have simply ignored the same parties requirement without any explanation,⁸⁰ but other cases have relied directly on the *Hunter/Demeter* concept of abuse of process.⁸¹

⁷⁷ (1983), 150 D.L.R. (3d) 249, at p. 264, 43 O.R. (2d) 33, at p. 48 (Ont. H.C.).

⁷⁸ [1943] K.B. 587, [1943] 2 All E.R. 35 (C.A.). There, in the context of an attempt to introduce a prior traffic conviction as evidence in a subsequent civil motor vehicle accident case, it was held that prior criminal convictions were inadmissible as evidence in subsequent civil proceedings. In England this decision has now been reversed by the Civil Evidence Act, 1968, c. 64, s. 11. Under s. 11, a previous conviction is admissible in a subsequent civil action for the purpose of proving that the person committed the offence and "he shall be taken to have committed that offence unless the contrary is proved". (By s. 13 in a defamation action, where the question arises as the whether a person did or did not commit a criminal offence, the previous conviction is conclusive). One Canadian jurisdiction, British Columbia, has adopted similar but not identical legislation; see the Evidence Act R.S.B.C. 1979, c. 116, ss. 80-81 (the weight to be given to the conviction is a matter for the trier of fact). See also, *infra*, footnote 132.

⁷⁹ *Supra*, footnote 77, at pp. 264 (D.L.R.), 48 (O.R.).

⁸⁰ *Ralston Purina Canada Inc. v. Canada Packers Inc.* (1985), 55 Nfld. and P.E.I.R. 254 (P.E.I.S.C.) (feed supplier whose feed had been held to be exclusive cause of farmer's loss, estopped from subsequently suing another feed supplier for contribution for damages awarded in first action); see, also, *LeBar v. Canada* (1988), 90 N.R. 5 (Fed. C.A.) (Crown precluded from relitigating issue it had already lost against different plaintiff).

⁸¹ *Bank of B.C. v. Singh* (1987), 17 B.C.L.R. (2d) 256 (B.C.S.C.) (where a court had earlier approved mortgage sale by bank, subsequent action against the bank's appraiser for negligence in not recommending appropriate price, struck out as an abuse of process); *Breen v. Saunders* (1986), 69 N.B.R. (2d) 427 (N.B.Q.B.) (action by convicted plaintiff against police for wrongful arrest and imprisonment in relation to the offence, struck out as abuse of process); *Bank of Montreal v. Crosson* (1979), 96 D.L.R. (3d) 765, 23 O.R. (2d) 625 (Ont. H.C.) (plaintiff bank which had moved unsuccessfully for judgment against one of several guarantors who delivered identical defences was prohibited from moving for judgment against the other defendants on the ground that it would be an abuse of

The case that best demonstrates this approach is the decision of the Manitoba Court of Appeal in *Solomon v. Smith*,⁸² which presented a classic situation for the application of defensive non-mutual issue estoppel. In an earlier Alberta action, Solomon had been found liable to the vendor for damages for breach of a real estate contract. Solomon had been the purchaser under the contract, and in the Alberta action he had unsuccessfully raised the defence of misrepresentation concerning the sale. Subsequently, Solomon instituted an action in Manitoba to recover the damages (awarded against him in the earlier action) from the vendor's agents who had negotiated the contract, alleging that they had made misrepresentations respecting the property. The Manitoba Court of Appeal held that the plaintiff's action should be struck out as an abuse of process. The court stated that the reasoning in *Parklane* abandoning the "same parties" requirement for issue estoppel was persuasive, but the Supreme Court of Canada⁸³ had affirmed this requirement and, hence, issue estoppel could not be relied on. However, the court held that the applicable principle was abuse of process.

Lyon J.A. stated:⁸⁴

I agree . . . that a plea of issue estoppel is not available. However, to permit the statement of claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast, institutionalized rules such as those which attach to the plea of issue estoppel. By encouraging the determination of each case on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as to the proper administration of justice can best be avoided . . . we must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process—a waste of time and resources of litigants and the Court and an erosion of the principle of finality so crucial to the proper administration of justice.

process); see, also, *Altobelli v. Pilot Insurance Co.*, *supra*, footnote 72 (where the major thrust of the reasons of the court of first instance were expressed in non-mutual issue estoppel terms, although the final decision was put on the ground of privity); but see, *Beaulieu v. McLaughlin*, *supra*, footnote 2 (in the first proceeding the plaintiff mortgagor had sued the mortgagee bank and the court held that there was no misrepresentation by the bank's solicitor (a non-party); in a subsequent action by the mortgagor against the solicitor alleging misrepresentation, the solicitor was unsuccessful in having the claim struck out on the ground that the issue of misrepresentation had been decided in the earlier proceedings; issue estoppel was inapplicable since the solicitor was not a party to the previous action; moreover no abuse of process would occur by permitting the second action to proceed). But contrast *Solomon v. Smith* (1987), 22 C.P.C. (2d) 12 (Man. C.A.) (discussed *infra*, the text at footnote 82), which arrived at a directly contrary conclusion.

⁸² *Ibid.*

⁸³ In *Angle v. Minister of National Revenue*, *supra*, footnote 10.

⁸⁴ *Supra*, footnote 81, at p. 19.

This decision demonstrates that Canadian courts are willing to achieve the same results as United States courts by simply using abuse of process as a surrogate for defensive non-mutual issue estoppel.⁸⁵

C. *Offensive "Estoppel" By Using a Prior Adjudication as "Prima Facie Evidence Subject to Rebuttal"*

It has already been noted that in *Demeter* it was held that *Hollington* was wrongly decided, did not represent the law in Ontario and (at first instance) that it would be appropriate to use a previous criminal conviction of a party in subsequent litigation as *prima facie* proof, subject to rebuttal on the merits. In so doing, the court sanctioned the importation into Ontario law of the principle found in the English Civil Evidence Act, 1968, s. 11.⁸⁶

In a raft of cases after the decision in *Demeter*, plaintiffs have successfully used previous criminal convictions offensively against a previously convicted defendant. Since these were cases of offensive usage, the basic "defensive" abuse of process analysis of *Demeter* and *Hunter* were inapplicable. Usually no attempt was made to mount a straight offensive non-mutual issue estoppel argument, along the lines of *McIlkenney* or the American authorities. Instead the cases have picked up on the language used by Osler J. in *Demeter* and have permitted the use of a previous criminal conviction as "*prima facie* evidence subject to rebuttal".⁸⁷ Typically these cases have involved

⁸⁵ In a rare example of Canadian courts showing sensitivity to the type of qualifications set forth in *Parklane*, the court in *Solomon* stated (*ibid.*, at pp. 19-20):

Of course, if it can be shown that statutory provisions, rules of procedure or other cause substantially alter the mode of trial or the degree of proof required as between one province and another, the application of the principle would and should fail. Such a substantial difference would be a legitimate defence against the plea of abuse of process. The record before us however shows no such substantial variation in statutory requirements, procedural practices or other cause. . . .

In *Verlysdonk v. Premier Petrenas Construction Co. Ltd.*, *supra*, footnote 75, at pp. 721 (D.L.R.), 71 (O.R.), the court pointed out that one of the reasons why preclusion would be inappropriate is that the appraisal process used to determine the plaintiff's recovery in the first action did not afford the appellant "a full and fair opportunity of dealing with the whole case".

⁸⁶ See *supra*, footnote 78.

⁸⁷ *Re Del Core v. Ontario College of Pharmacists*, *supra*, footnote 63 (pharmacists discipline committee entitled to use previous conviction of pharmacist as *prima facie* evidence, but not conclusive proof and the pharmacist had the right to adduce rebuttal evidence); *Q. v. Minto Management Ltd.* (1985), 15 D.L.R. (4th) 581, 46 O.R. (2d) 756 (Ont. H.C.) (in an action for damages for sexual assault the plaintiff sought to rely on the earlier conviction of the individual defendant for the assault; the previous conviction was held to be admissible even as against the corporate defendant, the individual defendant's employer, who had not been involved in the criminal trial; however, neither of the defendants were foreclosed from introducing evidence that the sexual assault had not been committed); *Royal Bank v. McArthur* (1985), 19 D.L.R. (4th) 762, 51 O.R. (2d) 86 (Ont. Div. Ct.) (plaintiff suing for damages for conversion entitled to use prior conviction for conspiracy to rob and robbery as *prima facie* evidence); *Clairborne Industries Ltd. v. National Bank of Canada* (1986), 28 D.L.R. (4th) 695, 55 O.R. (2d) 289 (Ont. H.C.) (prior criminal

prior criminal convictions, although at least two cases have involved using prior *civil* adjudications as *prima facie* evidence subject to rebuttal.⁸⁸ Only rarely in these cases has the argument been made that true preclusive effect should be given to the prior finding.⁸⁹ Two of the cases involved the issue actually faced by the court in *Hollington*: that is, what effect should be given in a subsequent automobile negligence action to the prior conviction of one of the parties for the violation of highway traffic laws.⁹⁰ (These cases raise the question of whether, if the courts openly adopt a general principle of offensive non-mutual issue estoppel as in *Parklane*, there is any justification for ever refusing total preclusion in favour of using a previous finding or conviction as *prima facie* evidence subject to rebuttal. This matter is explored in detail below).⁹¹

D. Mutuality Abandoned: Offensive Issue Estoppel Through the Use of Abuse of Process

This final group of cases is the most interesting and promising. They have abandoned mutuality⁹² by the device of calling situations where a

convictions admissible as *prima facie* evidence against convicted defendants only and were not evidence against non-convicted defendants); *Hanson v. "Ocean Victoria" Daichi Tanker KK*, [1985] 1 F.C. 451 (Fed. T.D.) (conviction based on guilty plea admissible as *prima facie* evidence); *Coutte v. Antonenko* (1986), 46 Sask. R. 161 (Sask. Q.B.) (guilty plea receivable in evidence and explanation thereof rejected); *Hutchinson v. York Sanitation Co.* (1986), 56 O.R. (2d) 778 (Master) (prior guilty plea admissible as *prima facie* evidence as to the facts).

⁸⁸ *Spataro v. Handler* (1988), 26 C.P.C. (2d) 28 (Ont. Dist. Ct.) (prior finding of professional misconduct by discipline committee admitted in subsequent civil action); *Re Rosenbaum and Law Society of Manitoba* (1983), 150 D.L.R. (3d) 352, [1983] 5 W.W.R. 752 (Man. Q.B.) (finding by a trial judge that a lawyer non-party witness had given false testimony was held to be admissible in subsequent discipline proceeding against lawyer as *prima facie* evidence, but could not be used as issue estoppel).

⁸⁹ *Rosenbaum, ibid*; *Re Del Core and Ontario College of Pharmacists, supra*, footnote 63; *Taylor v. Baribeau, supra*, footnote 63 (a party to a personal injury action who had previously been convicted of a traffic offence and who was both defendant and plaintiff by counterclaim in the motor vehicle action was unaffected by the doctrine of abuse of process since it could have no application to him *qua* defendant (as he was not the aggressor) and it would have no application to him *qua* plaintiff because he had a real interest in the outcome of his claim for damages, and hence his motive was not improper).

⁹⁰ *Taylor v. Baribeau, ibid.*, (prior conviction of the defendant for dangerous driving was held to be admissible as *prima facie* proof only, subject to rebuttal on the merits); *Catty v. James* (1985), 10 C.P.C. (2d) 313 (Ont. Dist. Ct.) (plaintiff's previous conviction for careless driving, but not for speeding, was admissible as *prima facie* evidence; at a trial before a jury the slight probative value of the speeding conviction was outweighed by the very significant prejudicial effect on the jury).

⁹¹ See, *infra*, the text at footnote 123.

⁹² *Holt v. Ashfield, supra*, footnote 62, appears to be the only Canadian case flatly abandoning mutuality, although it was a defensive estoppel case and could easily have been decided on the basis of traditional privity (plaintiff who unsuccessfully sued the purchaser of her mother's house claiming proprietary interest estopped from suing subsequent purchaser of the house asserting same proprietary interest). For a case abandoning mutuality, without

plaintiff relies *offensively* on an earlier decision against the defendant, an abuse of process. Typically, these cases have more or less come to grips with the underlying policy and functional considerations by directly discussing either *McIlkenney* or *Parklane*, or both.⁹³ What makes these cases of particular interest is that two of them are decisions of provincial appellate courts (and thus may well provide direction for the future).

In *Bomac Construction Ltd. v. Stevenson*⁹⁴ the Saskatchewan Court of Appeal faced the classic issue estoppel situation of an aircraft crash resulting in injuries to multiple passengers. In the first action, the defendants were held liable and in the second action, brought by a different passenger, the plaintiff sought issue estoppel on the question of the defendants' liability. The court held that, while issue estoppel could not apply because there were not the same parties in each action, the doctrine of abuse of process foreclosed the defendants (the plane owners and the pilot) from relitigating this issue. The court observed that there is a general policy in the law against relitigation of the same issue and that courts have not only viewed such matters under the established doctrine of issue estoppel, but also under the broader heading of the concept of abuse of process. Referring to Lord Diplock's judgment in *Hunter*, the court stated that he had "made it clear that he felt entitled to rely on the fact that proceedings constituted an abuse of process even though the doctrine of issue estoppel did not clearly apply".⁹⁵ The court acknowledged that the concept of abuse of process is usually considered applicable only to a plaintiff's claim so as to prevent the commencement of certain types of actions, but there is no apparent reason for its restriction to such circumstances when it is considered that the purpose is to prevent the raising of an issue which has already been squarely before the courts once before and the decision rendered. "There seems little justification for concluding that such an issue cannot be raised by a plaintiff but may be raised in defence by a defendant. If the concern is a valid one, it should not matter by what process the concern is raised."⁹⁶

discussion, and permitting offensive preclusion, see *LeBar v. Canada*, *supra*, footnote 80, discussed *infra*, the text at footnote 142.

⁹³ An exception is a little noticed Ontario decision from the late 1970s which arrived at a conclusion that was in some respects consistent with the American doctrine, although without referring to the American case law: *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 82 D.L.R. (3d) 302, 18 O.R. (2d) 215 (Ont. H.C.), affirmed (on a different point), 84 D.L.R. (3d) 256n, 18 O.R. (2d) 714n (Ont. C.A.), (where tenant had been found liable for shopping centre fire, in subsequent action by other tenants they were permitted to rely upon issue estoppel; moreover, the new plaintiffs' claim against other co-defendants who had been found not liable in the first action was dismissed on the ground that since the plaintiffs were identifying themselves with the plaintiff in the first action, they could not take a position inconsistent with the finding in the first action that these other defendants had not caused the fire). The decision is fully analyzed in Herman and Hayden, *loc. cit.*, footnote 5, at pp. 454-457.

⁹⁴ *Supra*, footnote 62. The decision is severely criticized in Gelowitz, *loc. cit.*, footnote 5.

⁹⁵ *Ibid.*, at p. 26.

⁹⁶ *Ibid.*, at p. 27.

The defendants made the argument that the plaintiff was, in effect, a "wait and see" plaintiff. By not joining in the first action the plaintiff had sought to assure its opportunity for two chances to succeed; if the first action was successful, she would seek to rely on it, whereas if the first action was not successful, she would have a second chance to succeed by proceeding with this case. In declining to give effect to this submission the court's response was draconian.⁹⁷

One cannot conclude that the ends of justice are best served by permitting such a situation to prevail. If the plaintiffs in separate actions wish to stand on their right to a separate trial where the facts and issues and defendants are identical with another claim, they must take the chance of having their claim follow the result in the first action. Similarly, the defendant liability must be taken as having been established in the first action. To rule otherwise would be to permit an abuse of process through the prospect of a multiplicity of actions, inconsistent results and no fitting end to the litigation process.

Without referring to *Bomac*, a similar result was arrived at in the Manitoba case of *Bjarnarson v. Manitoba*.⁹⁸ These two actions involved claims against the Province of Manitoba for flooding farmland. In the first action, one of two brothers sued and was successful in establishing that the flooding resulted from the negligence of the province. Subsequently, the second brother, who owned adjoining land, brought a similar action, and the plaintiff was successful in his claim that the defendants were precluded from relitigating the issue of liability. Hewak C.J.Q.B. at first instance took the bull by the horns and reviewed extensively the American and English authorities on mutuality. He noted that *Carl Zeiss Stiftung v. Raynor & Keeler Ltd. (No. 2)*,⁹⁹ clearly upheld the requirement of mutuality and that issue estoppel would not apply in circumstances where the party seeking to rely on the estoppel was not a party or a privy of the party to the prior proceeding. After describing how in the United States the requirement of mutuality had been criticised by the courts and by legal scholars, and ultimately abandoned in *Parklane*, he adopted the reasoning of the United States Supreme Court and of Lord Denning in *McIlkenney*.¹⁰⁰

I, for one, agree with both the direction and reasoning found in the decisions of Lord Denning and the United States Supreme Court, and the principles there applied. In my view, the law should be sensitive to current situations and alive to the exigencies of today. While it must always strive to be certain and clear, at the same time it should be flexible enough to encompass contemporary needs. In these times of aviation or common carrier disasters, chemical waste spills, or pharmaceutical accidents, when it is tragically quite common to have multiple litigants with the same cause of action against the same defendant, and where determination of a common issue impacts equally upon those litigants, the law as well as the litigants would be well served by such a fair and sensible legal doctrine. A doctrine

⁹⁷ *Ibid.*, at pp. 27-28.

⁹⁸ (1987), 21 C.P.C. (2d) 302 (Man.Q.B., C.A.).

⁹⁹ *Supra*, footnote 52.

¹⁰⁰ *Supra*, footnote 98, at p. 311.

that would not only tend to bring a finality to at least a portion of the litigation, but also would assist in protecting the litigants from the additional costs they otherwise would incur if they were required to re-litigate issues already decided when the only real issue remaining would be quantum of damage.

The Manitoba Court of Appeal, in a very short judgment,¹⁰¹ upheld the decision of first instance, but on slightly different grounds. It observed that Hewak C.J.'s reliance on issue estoppel in the absence of mutuality was inconsistent with the recent decision of the Court of Appeal¹⁰² that mutuality of parties is still a requirement for the application of issue estoppel. But it concluded that where a defendant has already been found negligent and had a full and fair opportunity to contest that finding, it would be an "abuse of process" to permit the defendant to dispute its negligence again in a second action and the defendant was hence precluded on the issue of liability.

In the final analysis, then, the Manitoba Court of Appeal upheld offensive non-mutual issue estoppel by simply calling it abuse of process. However, a difficulty with the decision is that neither the judge at first instance nor the Court of Appeal paid any attention to the "wait and see" qualification in *Parklane*, yet on the facts of the case, it appears to be a glaring case of a "wait and see" plaintiff. It is rather ironic, given the sweeping breadth of Hewak C.J.'s judgment and his reliance on *Parklane*, that the United States Supreme Court would likely have arrived at a different decision because of the "wait and see" problem.

In the subsequent case of *Germesheid v. Valois*,¹⁰³ the Ontario High Court gave affirmative preclusive effect to an earlier judgment and also directly confronted the "wait and see" problem. The case involved a fire in a bunkhouse on a construction site. In an earlier action, one of the injured workmen, P1, had successfully sued a number of defendants and this decision had been affirmed on appeal. Subsequently, another injured workman, P2, commenced a similar action and moved for summary judgment on the issue of liability against those parties who were losing defendants in the first action.

In holding that the losing defendants who were common to both actions were to be precluded on the liability issue, the court observed that Canadian courts have declined to abandon the requirement of mutuality,¹⁰⁴ but that they have arrived at the same conclusion by invoking abuse of process. It decided that on this ground the defendants were precluded from relitigating the issue of negligence and hence liability. However, the court directly confronted the fact that the plaintiff clearly had played "wait

¹⁰¹ *Ibid.*, at p. 312.

¹⁰² *Solomon v. Smith*, *supra*, footnote 81.

¹⁰³ (1989), 34 C.P.C. (2d) 267 (Ont. H.C.). An appeal was taken from this decision, but the case was ultimately settled and the appeal abandoned.

¹⁰⁴ Because of *Angle v. Minister of National Revenue*, *supra*, footnote 10.

and see". The court rejected the *Parklane* solution (refusing to allow estoppel), because to do so would open the risk of inconsistent decisions, involve the squandering of judicial time and would do injustice to the defendants who now supported the present plaintiff and had nothing to do with that plaintiff's conduct. Instead, the court addressed the wait and see problem by imposing cost sanctions with a two-fold purpose: to deter other litigants from adopting unjustified or unexplained "wait and see" tactics, and to indemnify the present defendants for the expenses they were now incurring because the plaintiff failed to participate during the first trial. The court ordered the plaintiff to pay the costs of all of the defendants on the motion on a solicitor and client basis and, to carry through the deterrent principle, it recommended that the trial judge should consider a similar order at trial in relation to any matters that were duplicated by reason of the failure of a plaintiff to have been involved in the first trial.

While Canada lacks a landmark decision of an appellate court clearly abandoning the mutuality requirement in favour of non-mutual issue estoppel, the decisions in *Solomon*,¹⁰⁵ *Bomac*¹⁰⁶ and *Bjarnarson*¹⁰⁷ spell the death of mutuality, albeit under the unfortunate and confusing rubric of "abuse of process". The next step is to abandon formally this terminology and adopt non-mutual issue estoppel. In so doing Canadian courts must address certain problems inherent in the doctrine and must reconcile the evidentiary and estoppel usage of prior decisions. These matters are addressed *infra*, in Part VI,¹⁰⁸ but before so doing, it is useful to give a summary of recent experience in the United States with the doctrine.

V. "U.S.A. Today"

As we have seen, non-mutual preclusion against those who have already litigated and lost has long been the general rule in the United States. However, three aspects of the contemporary operation of the doctrine are worthy of brief comment. First, the "toxic tort" cases have demonstrated that issue estoppel is not a panacea for repetitive litigation. Second, there has been a movement towards extending issue estoppel to permit its use against *non-parties*. Third, the United States Supreme Court has exempted the central government from the operation of non-mutual preclusion.

The United States is currently enduring what is considered by some to be a nation-wide, mass-tort litigation crisis resulting from a staggering volume of "toxic-tort" cases arising from defective drugs (for example, Bendectin and DES) and various injury causing products (for example,

¹⁰⁵ *Supra*, footnote 81.

¹⁰⁶ *Supra*, footnote 62.

¹⁰⁷ *Supra*, footnote 98.

¹⁰⁸ *Infra*, p. 656.

asbestos, Agent Orange and the Dalkon Shield I.U.D.).¹⁰⁹ Experience has demonstrated that attaining the efficiency promised by non-mutual preclusion in these cases is far more problematic than the courts that forged the doctrine foresaw. The doctrine has been relatively easy to apply, and has worked effectively in the context of mass accidents (for example, a railroad or airplane crash). Mass-accident litigation involves a single event harming a limited number of claimants, simultaneously, at one location (for example, a cruiseship food poisoning episode, a nightclub fire or a hotel skywalk collapse). In such cases, usually a single issue—negligence—is dispositive of liability and all relevant facts on this issue are identical for all claimants and there is only one or few potentially liable defendants. Non-mutual preclusion can be a potent device in avoiding repetitive litigation with regard to mass-accidents, but it has proved to be largely unsuccessful and of low utility in reducing repetitive litigation in the new mass tort cases, the “toxic-torts”. These cases typically exhibit quite different and complicating factors, *e.g.*, claimants are spread across the whole country; many different defendant manufacturers may be involved; facts are dissimilar and liability depends upon proof of exposure (which will have occurred at different times) and upon the manufacturer’s knowledge at the time of each claimant’s exposure. These characteristics have rendered issue estoppel impotent, primarily for reasons that are unrelated to non-mutuality.

The factors contributing to the inability of offensive issue estoppel to fulfill its promise in the toxic-tort context has been graphically demonstrated in asbestos litigation.¹¹⁰ In those cases the major problem has centered around the number and extent of individual issues presented by such litigation (for example, the ever litigatable questions of individual plaintiff’s exposure and sufficiency of exposure) and the difficulty of determining what was decided in Action #1 (which is greatly complicated by the use of jury trial) and whether the issues decided are identical to issues arising in Action #2.¹¹¹ This inability of subsequent plaintiffs to satisfy the court of “identity

¹⁰⁹ The extent of the problem and the inability of non-mutual preclusion to ease the crisis is described in Ratliff, *op. cit.*, footnote 11; L.S. Mullenix, Case Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act (1985-86), 64 Texas L. Rev. 1039; D.J. Gunn, The Offensive Use of Collateral Estoppel in Mass Tort Cases (1982), 52 Miss. L.J. 765; M. Weinberger, Collateral Estoppel and the Mass-Produced Product: A Proposal (1979-80), 15 New Eng. L. Rev. 1; K. Erlenbach, Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable (1982-83), 14 St. Mary’s L.J. 19.

¹¹⁰ See Green, *loc. cit.*, footnote 40; Note, An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation (1983), 36 Vanderbilt L. Rev. 573, at pp. 659-689.

¹¹¹ The “same issue problem” is exacerbated by the fact that cases have been brought in virtually every state and the laws governing the determination of liability differ. Moreover, if the defendant’s knowledge of potential harmful effects is relevant to liability, this gives rise to questions of when the defendant had the requisite knowledge and whether the plaintiff’s exposure occurred at a time when the defendant had that knowledge. Since a verdict rarely reveals with any precision the jury’s findings, any overlap in the exposure periods of plaintiffs, combined with uncertainty about the temporal scope of the first verdict, creates an ambiguity that logically prevents the use of collateral estoppel.

of issues" has understandably led to holdings that issue estoppel is inapplicable. But this has created a further complicating factor. Numerous subsequent actions have thus gone to trial, leading to inconsistent determinations which in turn has led later courts to refuse to invoke non-mutual preclusion on the grounds of unfairness. Other fairness considerations have also played a role. Inconvenience of the forum and the (initially small) amount at stake, the unavailability of evidence and witnesses, limited procedural opportunities and any other factors suggesting that less than a fair and thorough opportunity to demonstrate the merits of one's case have dissuaded courts from making more than mildly effective use of the doctrine as a means of streamlining asbestos litigation.

The inability of issue estoppel to assist in the resolution of these toxic-tort cases (which are literally paralyzing some United States courts) has led to numerous calls for the development of other less private, less individual-litigation oriented mechanisms, to deal with this type of product liability case, in particular class actions.¹¹²

A second contemporary development in the United States is the attempt to expand collateral estoppel to include the estoppel of non-parties.¹¹³ Such an extension would permit a common defendant to use a judgment in his or her favour against later plaintiffs who, since the demise of mutuality, may use an unfavourable judgment against the common defendant.¹¹⁴ This is seen by some as a way of solving the problem of the "wait and see" onesidedness (the option effect) that offensive estoppel produces. By permitting collateral estoppel of non-parties the option effect "would disappear and mutuality, albeit of a different sort, would be restored".¹¹⁵

Recent decisions have stretched traditional doctrine and allowed issue estoppel to be used against non-parties in various situations.¹¹⁶ Some cases have manipulated the privity concept finding privity based on a variety of relationships independent of litigation, for instance, between husband and wife or defining privity to cover certain business or contractual relationships.¹¹⁷ Other cases, going beyond privity, apply issue estoppel to a non-party who participated in a prior decision as a strategist or financier

¹¹² See Ratliff, *loc. cit.*, footnote 11 and Mullinex, *loc. cit.*, footnote 109. See also, D. Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means* (1986-87), 62 Ind. L.J. 561. The National Law Journal, September 3, 1990, p. 3, reports that three federal judges, who together have 10,000 asbestos cases, are attempting to formulate a national class action, but without success to date.

¹¹³ The following analysis is based on Motomura, *loc. cit.*, footnote 37. See also, Pielemeier, *loc. cit.*, footnote 23, and Schroeder, *loc. cit.*, footnote 23. For an extensive, critical account of the caselaw on estoppel of non-parties, see Wright, Miller and Cooper, *op. cit.*, footnote 5, paragraphs 4448-4462.

¹¹⁴ Motomura, *loc. cit.*, footnote 37, at p. 1025.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, at p. 1026.

¹¹⁷ *Ibid.*

of the litigation.¹¹⁸ The most radical departure from the rule against non-party preclusion is found in a case relying on "virtual representation", holding that a "non-party is bound if a party who had the same interest litigated the prior case, even though the non-party was neither a participant nor in privity with the party in the prior proceeding".¹¹⁹ These developments reflect significant pressure for the expansion of issue estoppel to permit non-party preclusion. Some commentators welcome the development, while others view it with scepticism and alarm. Moreover, there are serious constitutional and fairness concerns as to whether estoppel of non-parties can meet the requirements of procedural due process in denying the individual litigant his or her day in court. However, this movement represents a concerted effort to redress the imbalance of the option effect given to plaintiffs by unqualified non-mutual issue estoppel. (In Part VI suggestions will be made as to how some of the benefit of non-party preclusion can be achieved in a way that does not deprive the non-party of his or her day in court).¹²⁰

The final recent development is the Supreme Court's holding, in *United States v. Mendoza*,¹²¹ that non-mutual preclusion may not be invoked as against the United States Government. The action was one of a string of cases that followed an unappealed lower court ruling entitling a Filipino veteran to be naturalized as an American citizen. The court gave several reasons for its holding. The government is a party to a far greater number of cases than any other litigant in the federal courts, its litigation often involves issues of great public importance and preclusion might often freeze development of law with the first ruling. (A further consequence would be that the court could not rely on its general practice of deferring review until a number of courts of appeal had the opportunity to agree or disagree on the issue).

The court also asserted that the preclusion of government relitigation would put an intolerable burden on the losing government agency (effectively forcing it to appeal every adverse decision, which would substantially reduce the government's flexibility in formulating litigation strategy) and would defeat the object of preclusion by increasing litigation through appeals. Finally, in what may be seen as the unnecessary politicalization of the

¹¹⁸ *Ibid.*, at p. 1028.

¹¹⁹ *Ibid.*

¹²⁰ *Infra*, p. 656 *et seq.*

¹²¹ 464 U.S. 154 (1984). For critical analysis, see A.L. Levin and S.M. Leeson, Issue Preclusion Against the United States Government (1984-85), 70 Iowa L. Rev. 113; Note: Collateral Estoppel and Non-Acquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality (1985-86), 99 Harv. L. Rev. 847. However, in the companion case of *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984), the court held that the doctrine of mutual defensive collateral estoppel is applicable against the government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts.

law, the court held that successive administrations may legitimately adopt different views on issues of public law, and ought not to be controlled by the preclusion consequences of judgments accepted by earlier administrations.

VI. Problems and Proposals

The foregoing discussion suggests two major problem areas that call for further analysis and resolution. The first (arising primarily from the Canadian case law) is the relationship between using prior judgments preclusively as issue estoppel and using them evidentially as *prima facie* evidence subject to rebuttal. The second problem is that embracing offensive non-mutual issue estoppel can encourage potential plaintiffs to "wait and see": to refrain deliberately from participating in the first action (against a common defendant) with a view to exercising an option subsequently, *i.e.*, to invoke issue estoppel if the defendant is found liable in action #1, or to disregard the decision in that action if the defendant is vindicated and to proceed to relitigate the issue of the defendant's liability.

A. *The Role, if any, for Using Prior Judgments as "Prima Facie Evidence Subject to Rebuttal"*

We have seen two ways in which prior judgments have been used in subsequent proceedings involving different parties—as truly preclusive issue estoppel (which prevents re-litigation) and using the prior judgment as *prima facie* evidence subject to rebuttal (which permits re-litigation, but with the prior judgment being admitted in evidence in the second litigation). If mutuality is abandoned, and non-mutual preclusion is adopted subject to the qualifications already articulated, two questions arise: how do these rules relate to one another and do we need both?¹²²

These questions need to be addressed in two separate contexts. The first is where preclusive effect is sought against a *party* to the former litigation. The second context is whether there is a role for using the *prima facie* evidence approach as a modified form of *non-party* estoppel?

(1) *Where Preclusive Effect is Sought Against a Party to the Former Litigation*

In the first context, reason dictates that if the conditions for non-mutual preclusion are met, this "stronger" doctrine should apply leaving no room for the *prima facie* evidence approach. If the dual components of the doctrine, fairness and efficiency, are met, than issue estoppel should

¹²² In this context it is worth noting that Bentham proposed an evidentiary use of the former judgment rather than preclusive use. "[T]hat, however, because [a judgment] ought not to be made conclusive, it ought not to be admissible, is an inference which none but a lawyer would ever think of drawing"; Bentham, *op. cit.*, footnote 17.

apply and the former judgment should preclude relitigation.¹²³ This has certainly been the doctrinal development in the United States. As Professor Motomura¹²⁴ has described, historically in the United States, there were various instances of the use of prior judgments as evidence. But as mutuality was abandoned it ousted the weaker doctrine in those areas where the evidentiary use of prior judgments was being used as a surrogate for non-mutual issue estoppel (that is, the judgments were being used evidentially against those who had been parties to the prior proceeding). The logic of this approach is persuasive. If the conditions for the application of non-mutual preclusion are met, preclusive effect should be given to the prior judgment rather than merely making it a matter of evidence.

But accepting this general proposition still leaves circumstances where it will be appropriate to use the evidentiary approach. This can be seen by examining the *Hollington v. Hewthorn* type of scenario, that is, a prior traffic conviction followed by a subsequent civil motor vehicle action. Here, if we apply the tests necessary to determine whether non-mutual preclusion should be available it will often lead to the conclusion that it is inapplicable. First, frequently in such cases the "full and fair opportunity to defend" test will not be met because given the nature of most traffic court proceedings the now convicted person will often have lacked the incentive to litigate fully the issue in the traffic court.¹²⁵ Second, if we accept the notion that

¹²³ Subject of course to the traditional and very narrow exceptions to the application of issue estoppel, that is, if it can be shown that the previous decision was obtained by fraud or collusion, or if it can be shown that since the previous decision new evidence has come to light (which could not have been ascertained before by reasonable diligence) and which entirely changes the aspect of the case: *Phosphate Sewage Co. Ltd. v. Molleson* (1879), 4 App. Cas. 801, at p. 814 (H.L.). These exceptions are discussed in *McIlkenney v. Chief Constable of the West Midlands*, *supra*, footnote 17, at pp. 319 (Q.B.), 237 (All E.R.), and in *Hunter v. Chief Constable of West Midlands*, *supra*, footnote 55, at pp. 545 (A.C.), 736 (All E.R.). Recently it has been held that if fresh material or new developments in the law show that an issue has been wrongly decided either in fact or law, the court will allow the issue to be reopened in subsequent proceedings between the parties if this is necessary to work justice between the parties: *Arnold v. National Westminster Bank plc* (1990), 140 New L.J. 129 (C.A.).

¹²⁴ *Loc. cit.*, footnote 37.

¹²⁵ See, H.C. Karlson, *Criminal Judgments as Proof of Civil Liability* (1982), 31 Defense L.J. 173, at p. 192, pointing out that "[u]nless a defendant is aware that the outcome of the traffic court proceeding will create a substantial risk of civil liability, he usually has little incentive to contest the issue of guilt. Minor fines imposed by traffic courts create no desire on the part of a defendant to expend the funds necessary to obtain an attorney and litigate the issues. A driver may plead guilty to a minor traffic offense because the cost of defending outweighs the burden of having such a conviction on his record". The author points out that the majority of jurisdictions in the United States refuse to permit minor traffic convictions to preclude relitigation of issues in a civil action for these reasons and in such cases, the conviction is used as evidence only. A similar point with regard to lack of incentive is made in the Law Reform Committee, 15th Report (The Rule in *Hollington v. Hewthorn*) (Cmd. 3391, 1967), para. 13. In the United States a guilty plea is not a basis for issue estoppel because the issue was not "actually litigated", but

the driving force behind non-mutual preclusion is judicial efficiency and that it should not apply where efficiencies are minimal or non-existent, then there may be a further reason for not applying preclusion in the subsequent civil negligence action. Often in such cases, issues other than the liability of the convicted person are present (for example, the plaintiff's contributory negligence and the comparative negligence of other defendants) so that all the evidence relating to the accident has to be adduced (including the evidence relating to the convicted person's negligence). The end result is that there may be no efficiency gains and, moreover, giving preclusive effect to the conviction may actually complicate the second adjudication.¹²⁶

If, however, in any given circumstances it is inappropriate to give preclusive effect to a prior judgment, resort may still be had to admitting the prior judgment as *prima facie* evidence subject to rebuttal, since the fairness rights of all persons affected are protected by their ability to call evidence to rebut the *prima facie* evidence arising from the earlier judgment.¹²⁷ But in some cases involving the use of prior criminal convictions in subsequent civil actions, non-mutual preclusion will be *quite* appropriate, for example, after a fully contested rape trial where the accused was vigorously represented and faced a substantial period of imprisonment, and was convicted. If the convicted person is subsequently sued for damages for assault, a court should normally conclude that such an accused had

the plea may (as an admission) be treated as conclusive in some states, or as evidence against the party in a subsequent action: see Restatement, *op. cit.*, footnote 5, para. 27, comment (e).

A further argument for not giving preclusive effect to traffic convictions, involving both fairness and efficiency, is that often the real party in interest in the subsequent civil action will be an insurance company, which will not have participated in the criminal defence of the insured. From an efficiency point of view, the last thing we want to do is to have insurance companies defending every traffic prosecution against their insured on the off chance that there may subsequently be a civil negligence claim.

¹²⁶ In the United States, for both of the reasons given in the text, prior judgments of guilt or civil liability may not be given preclusive effect in such cases; Restatement (2nd) of Judgments, paragraph 29(6), comment (h) (1982). These concerns also formed part of the reasoning in *Hollington* itself. The point is made in the Law Reform Committee Report, *op. cit.*, footnote 125, para. 23.

¹²⁷ See, *Hunter v. Chief Constable of the West Midlands*, *supra*, footnote 55, at pp. 544 (A.C.), 735 (All E.R.). For further justification of using prior decisions as *prima facie* evidence where non-mutual preclusion is inappropriate, see text, *infra*, at footnote 134.

Questions obviously remain as to how effectively a court, particularly where there is a jury, can balance the previous conviction against any rebuttal evidence. This matter is analyzed in some depth by Motomura, *loc. cit.*, footnote 37, at pp. 1037-1051, concluding that on balance a properly instructed jury should be able to give appropriate weight to the prior adjudication and any rebuttal evidence. Fairness considerations will also come into play where mere evidentiary use is to be made of a prior decision, although they are far less pressing than when preclusive effect is to be given. On this issue, see the sensitive approach taken by Coe J. in *Catty v. James*, *supra*, footnote 90.

Herman and Hayden, *loc. cit.*, footnote 5, at pp. 459-467, are sharply critical of such "half-way house" usage as *prima facie* evidence subject to rebuttal.

a full and fair opportunity to defend.¹²⁸ The conditions for non-mutual preclusion will have been met and issue estoppel should apply to the exclusion of giving the previous conviction effect as *prima facie* evidence subject to rebuttal.¹²⁹

This analysis gives rise to a further question. Where non-mutual preclusion is appropriate, should it be applied even in the face of a statute such as the United Kingdom Civil Evidence Act, section 11,¹³⁰ providing for the mere use of the prior criminal conviction as *prima facie* evidence? (This issue may obviously arise in the United Kingdom if the courts abandon mutuality and adopt offensive issue estoppel in a non-criminal conviction context, that is, in the mass accident situation). If mutuality is openly abandoned it really undercuts the predicate to section 11, which is that issue estoppel is limited to the same parties. On this question, the United States experience with its anti-trust legislation is illustrative. Legislation predating the abandonment of mutuality provided that where the government had brought a successful anti-trust criminal or civil action, then in any subsequent civil action against the violators by a private plaintiff, the prior adjudication could be used as *prima facie* evidence. After the abandonment of mutuality the issue arose as to whether such prior adjudications could be used as collateral estoppel. Some courts concluded that the legislative rule pre-empted general collateral estoppel rules in anti-trust cases, but other courts and commentators took the view that the evidentiary effect under the legislation was a minimum standard only, and that collateral estoppel should be available whenever general doctrine permitted.¹³¹ Ultimately Congress responded by amending the legislation to permit collateral estoppel against defendants who were common to both actions.¹³²

(2) *Where Preclusive Effect is Sought Against Non-Parties to the Former Litigation*

Is there a role for the use of a prior judgment as "*prima facie* evidence" as a modified form of non-party estoppel?¹³³ Non-mutual preclusion permits

¹²⁸ This will also be true of some traffic convictions, for example, for impaired driving, where there was a vigorous defence. I am not suggesting a separate rule for traffic convictions and other convictions (but see, *supra*, footnote 125, as to the role of insurance). In all cases a functional analysis is required.

¹²⁹ See Karlson, *loc. cit.*, footnote 125, and contrast *Q. v. Minto Management*, *supra*, footnote 87 (use as evidence only).

¹³⁰ *Supra*, footnote 78.

¹³¹ Motomura, *loc. cit.*, footnote 37, at pp. 991-994.

¹³² *Ibid.* See the Clayton Act, para. 16(a) (1982). Canada has a similar provision to the former Clayton Act section permitting *prima facie* evidentiary use of previous convictions in subsequent civil proceedings against the accused: see the Competition Act, R.S.C. 1985, c. C-34 (as amended) s. 36(2).

¹³³ The recent American experience with precluding non-parties is discussed, *supra*, the text at footnote 113.

estoppel only against persons who were parties to the original proceeding: it does not permit preclusion against non-parties to the initial adjudication. To do so would simply be to deprive such persons of their "day in court" and due process. But while this *caveat* is logical and necessary it gives rise to two problems. It is the very source of the "option effect" in offensive non-mutual issue estoppel and it is "inefficient" in the sense that it "wastes" the results of the first adjudication even where that adjudication was extensive, thorough and appears sound. Using prior judgments in subsequent litigation as *prima facie* evidence against persons who were not parties to the initial adjudication seems a reasonable and quite defensible "half-way house" that can aid in resolving both these problems. There is respectable precedent both in statutes and caselaw for such an approach. The English Civil Evidence Act, section 11¹³⁴ makes prior convictions admissible evidence in *any* proceeding, not just a proceeding to which the accused is a party. Common law precedent is to be found in United States patent law¹³⁵ and in Canadian caselaw.¹³⁶

This intermediate ground of using prior judgments as *prima facie* evidence against non-parties is an acceptable response to the problem of how to use the results of prior adjudications as against non-parties. It avoids wasting the prior judgment, thus aiding efficiency, while at the same time protecting the rights of non-parties to their day in court. They are still free to call any evidence they choose to rebut the earlier judgment.¹³⁷

¹³⁴ *Supra*, footnote 78.

¹³⁵ In patent validity litigation a patentee cannot use a prior finding of patent *validity* to preclude a different alleged infringer, who was not a party to the prior proceeding, from contesting the validity of the patent. With non-mutual preclusion unavailable the only alternative to disregarding completely findings of validity is to admit them into evidence and the United States courts have consistently done so. The purpose is to relieve a patent holder of the expense and uncertainty of re-establishing validity from scratch whenever the patent is challenged. See, Motomura, *loc. cit.*, footnote 37, at pp. 999-1001. To achieve the same objective the United Kingdom Patents Act 1977 adopts a different approach. "In order to prevent a patentee from being put repeatedly to the expense of defending successive attacks on the validity of his patents, s. 65 provides that a court may, in any proceeding, certify that the validity of claim was contested in those proceedings and when this is done, if in any subsequent proceeding for infringement or for revocation of the patent, the patentee is successful, he is entitled to costs as between solicitor and client unless the court orders otherwise": T. Terell, in D. Falconer, W. Aldous and D. Young (eds.), *The Law of Patents* (12th ed., 1971), para. 972. See also, C.I.B.A., *Guide to the Patents Act 1977* (2d ed., 1984), p. 318.

¹³⁶ *Q. v. Minto Management Limited*, *supra*, footnote 87 (evidentiary use of conviction against convicted person's employer), but contrast with *Claiborne Industries Ltd. v. National Bank of Canada*, *supra*, footnote 87.

¹³⁷ See *Hunter v. Chief Constable of the West Midlands*, *supra*, footnote 55. Motomura, *loc. cit.*, footnote 37, at pp. 1032-1036 argues in favour of using judgments as evidence in lieu of non-party preclusion and analyzes the issue in considerable depth. He also, at p. 980, refers to the writings of other commentators who have suggested evidentiary use of judgments.

(3) *Others Areas—Administrative Determinations and Cases Involving Government*

Another area where evidentiary use of a prior judgment, rather than preclusive use, seems preferable is with regard to the use by courts of prior decisions arrived at by administrative tribunals.¹³⁸ In many instances giving non-mutual preclusive effect to administrative determinations in judicial proceedings will be inappropriate on general principles, since very frequently the procedural differences¹³⁹ between the two settings will simply make it unfair to give preclusive effect to the administrative determination.¹⁴⁰

If in embracing non-mutual preclusion Canadian courts adopt the United States Supreme Court's approach in *United States v. Mendoza*¹⁴¹ and refuse to permit the doctrine to be used against the government, this would be another area in which it would be appropriate to allow a prior decision to be used as *prima facie* evidence. That there may be a need to so qualify non-mutual preclusion is illustrated by the decision in *LeBar v. Canada*,¹⁴² where non-mutual issue estoppel was applied against the government of Canada in circumstances that suggest there may be some wisdom in the *Mendoza* exception. In that case, in Action #1 the court had enunciated a method of calculating the term of imprisonment to be served by inmates before their release. This formula was not followed with regard to LeBar's release and he successfully brought an action for damages for unlawful imprisonment. The court held that the Crown was precluded from re-litigating the issue as to the proper calculation of release dates, rejecting an argument that issue estoppel did not apply because the decision relied upon by the plaintiff was inconsistent with another decision on the same issue involving the Crown. The court took the view that

¹³⁸ In the Canadian context there may be a constitutional problem with superior courts accepting as binding the determination of a tribunal that is not a court, under s. 96 of the Constitution Act, 1867. On the general question of the impact of s. 96 on the jurisdiction of courts and administrative tribunals, see P. Hogg, *Constitutional Laws of Canada* (2nd ed., 1985), pp. 150-164. I am indebted to Mr. Eric Gertner for raising this issue. Australian cases have refused to give estoppel effect to the findings of non-judicial administrative tribunals in subsequent court proceedings; see, *R. v. Gough; Ex parte Municipal Officers' Association* (1975), 133 C.L.R. 59 (H.C. Aust.); *Australian Transport Officers Federation v. State Public Services Federation* (1981), 34 A.L.R. 406 (F.C.A.).

¹³⁹ Which is further reinforced by the fact that, typically, no appeal to a court is available from tribunals and the only method of review is limited judicial review.

¹⁴⁰ Where this is so it would seem appropriate to use the administrative determination as *prima facie* evidence subject to rebuttal. See, R.R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings* (1983), 35 U. of Florida L. Rev. 422, persuasively making this argument and advocating mere evidentiary use of administrative determinations. In *Spataro v. Handler*, *supra*, footnote 88, the court appears to have permitted the evidentiary use of a prior administrative determination.

¹⁴¹ *Supra*, footnote 121.

¹⁴² *Supra*, footnote 80.

it was the duty of the Crown to have appealed one or both of the earlier decisions, and in the absence of such appeal the government was precluded by the case relied upon by the plaintiff. The decision in *LeBar*,¹⁴³ and the facts and outcome of the case, suggest that there may be a need within the Canadian context, at least with constitutional and public law decisions, to give the Crown relief from the effects of non-mutual issue estoppel for some of the reasons put forward in *Mendoza*. (For example, to avoid pressure on the Supreme Court of Canada to either grant leave to appeal in all cases or expose the government to issue estoppel if leave is refused).¹⁴⁴

B. The "Wait and See" Problem: Disarming the Option Effect

As the United States Supreme Court in *Parklane* recognized, the offensive use of non-mutual issue estoppel carries with it the problem that potential plaintiffs may play "wait and see". Unless the rules as to the applicability of the doctrine take this into account, the unmodified use of the doctrine encourages "wait and see" and hence duplicative litigation. By staying out of Action #1, P2 escapes being bound by a decision adverse to the plaintiff in Action #1, but if P1 is successful in that action in establishing the defendant's liability, the subsequent plaintiff can use issue estoppel against the common defendant in Action #2. Professor Ratliff has observed that this "option effect" is part and parcel of the doctrine.¹⁴⁵ In *Parklane*¹⁴⁶ the court acknowledged what Professor Currie had earlier identified as this "multiple claimant anomaly",¹⁴⁷ and proposed as part of the doctrine that preclusion should be denied "in cases where a plaintiff could easily have joined in the earlier action". Experience has indicated that for two reasons the Supreme Court's qualification of the doctrine is ineffective.

¹⁴³ See also, *Emms v. The Queen*, [1979] 2 S.C.R. 1148, at pp. 1160-1162, (1979), 102 D.L.R. (3d) 193, at pp. 200-202 (per Pigeon J.). The traditional view in Commonwealth countries is that the Crown is bound by *res judicata*; see, P. Hogg, *Liability of the Crown* (2nd ed., 1989), pp. 191-192. However, it must be kept in mind that such doctrine was developed within the context of mutuality which requires that the parties to both litigations be the same.

¹⁴⁴ A number of colleagues who have read this article in manuscript were dubious about this suggestion. However, I believe it must be taken seriously. In a regime of non-mutuality, without such an exception, an unappealed decision against the government on an issue by even a trial court (e.g., that the Income Tax Act is unconstitutional) can lead to preclusion. Requiring the federal government to appeal every decision or face permanent preclusion would likely be unfair to (the original) individual litigants and, given that the federal government has more cases before the court than any other litigant, will lead to further court congestion and inefficiency. One policy underlying non-mutuality is to avoid the common defendant abusing subsequent plaintiffs, and the court, by attempting to relitigate the issue already decided without good reason. In the case of the government there are various pressures to act responsibly (publicity, Parliament, elections) that are absent in the private sector and hence there is not the same need to discipline the government as a litigant as there is with private sector litigants.

¹⁴⁵ Ratliff, *loc. cit.*, footnote 11.

¹⁴⁶ *Supra*, footnote 23, at pp. 330-331.

¹⁴⁷ Currie, *loc. cit.*, footnote 5.

First, the sanction that follows (the plaintiff in Action #2 may not rely on issue estoppel and hence must reprove the claim) is an insufficient deterrent, since it puts the plaintiff in no worse a position than he would have been in Action #1 (of having to prove his claim), but he is still ahead because he escapes the risk of an adverse decision in Action #1 and he may have learned a great deal—in terms of proving his claim—from “observing” the earlier litigation. (Moreover, where P2 is permitted to obtain preclusive effect from the decision in action #1, he or she escapes the cost of establishing liability).¹⁴⁸ Second, the United States caselaw indicates that, in any event, the courts have been extremely slow to impose even the suggested sanction and have generally declined to do so.¹⁴⁹

Where does this leave us? Does offensive non-mutual issue estoppel ultimately have to be rejected because of an “incurable” option effect? I suggest not. Instead, what is necessary are strategies to avoid the problem. These fall into two categories—“second case strategies” to discourage litigants from holding back, and “first case strategies” designed to marshal together in the first action all related claims against a common defendant to bring about one common determination. Both approaches involve adopting a policy perspective that to maximize judicial efficiency and to remove the unfairness of the option effect, the legal system should generally require that like and related claims should be subject to only one adjudication.¹⁵⁰

“Second case strategies” are rules to be imposed in case #2 to discourage P2 from holding back from participating in case #1. There is a range of them which can be used individually or collectively. The first is a strengthening of the *Parklane* qualification: P2 must satisfy the court in the second action that he or she has a “cast iron” reason for not having joined in action #1. Desire to sue alone, rather than with others, should be an insufficient excuse. The test should be: if P2 was aware of action #1 and joinder or consolidation would have been permitted had P2 sued at the time of action #1, then he or she should be treated as a wait and

¹⁴⁸ Avoiding the cost of establishing liability, and thus obtaining a free-ride financially, seems to have been overlooked or underrated in the literature as a reason for P2 to stay out of the first action. See, *infra*, for a suggestion of using orders redistributing costs to remove this incentive.

¹⁴⁹ Ratliff, *loc. cit.*, footnote 11, at p. 86, states that “in fact, of some 40 odd cases specifically citing *Parklane*’s ‘could have joined’ language, only 5 have used that standard to disqualify option holders”. He analyzes the caselaw and concludes that “these holdings indicate that courts are likely to disqualify wait-and-see plaintiffs only in the most egregious cases”. The courts’ self-interest in having to allocate resources to retry the issue already decided and their interest in avoiding the embarrassment of inconsistent determinations, are likely at least a partial explanation for the courts’ unwillingness to take a “tough” line with wait-and-see plaintiffs.

¹⁵⁰ For a useful general discussion, see J.C. McCord, A Single Package for Multi-Party Disputes (1975-76), 28 Stan. L. Rev. 707. For an early articulation of some of the suggestions made here, see Semmel, *loc. cit.*, footnote 5.

see plaintiff.¹⁵¹ Second, the defendant's conduct should be taken into account. If at the time of action #1 action #2 was pending and the defendant did not request consolidation (where it would have been granted), then P2 should be entitled to rely on issue estoppel.¹⁵² In such circumstances the "option effect" is not unfair, it is of the defendant's own making.¹⁵³

The next issue is what consequences should follow from P2 being declared to be an improper wait and see plaintiff? The *Parklane* sanction (the plaintiff cannot rely on issue estoppel and must prove his case) is obviously inadequate. Two possibilities present themselves and both have been suggested in Canadian cases. The first, and less draconian, is to use the Anglo-Canadian device of general cost indemnity (fee shifting) to punish and discourage the wait and see plaintiff, that is, by ordering the plaintiff to pay the defendant's costs in action #2 on a solicitor and client basis,¹⁵⁴ or, requiring the plaintiff to bear part of the costs incurred in the first action—an action the plaintiff should have joined in and the benefit of which the plaintiff now seeks to reap.¹⁵⁵ A second, draconian sanction is that proposed in *Bomac Construction Limited v. Stevenson*¹⁵⁶—that a true "wait and see" plaintiff should be held to be bound by any adverse decision in the first action. (While this is certainly an extreme position it is not to be mistaken as simply unthinking, non-party issue estoppel. Rather, it is based upon P2's own "abuse of process": under the policy perspective adopted here, there is an obligation on P2 to join in the earlier litigation and the sanction for not so doing is that P2 is bound by any adverse decision in that action, that is, P2 is bound by the earlier adverse

¹⁵¹ Compare the A.L.I. proposal, *infra*, footnote 166, providing for court notification to non-parties and *prima facie* preclusion whether or not they participate. In federal states such as the United States and Canada problems are produced by the fact that potential plaintiffs are sometimes spread over various states and provinces and it may be unfair to require plaintiffs to travel to an inconvenient forum at the risk of being declared a "wait and see" plaintiff with the sanctions envisaged in the text. Perhaps the way to deal with this problem is through "first case strategies" providing a national forum for such cases. See *infra*, footnote 167.

¹⁵² This notion could be further extended by requiring defendants, who at the time of the first litigation are aware of claimants who have not yet sued, to take third party proceedings to determine their liability, if any, to the non-suing claimants. Modern rules of court now often permit third party proceedings to be used as such a general joinder device.

¹⁵³ See *Bragg v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*, *supra*, footnote 2, and the Restatement, *op. cit.*, footnote 5.

¹⁵⁴ See *Germesheid v. Valois*, *supra*, footnote 103.

¹⁵⁵ For a precedent (in a different context) that those receiving benefits from a suit should be required to help pay its expenses ("the common benefit theory"), see *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). See also J. McCamus, *The Self-Serving Intermeddler and the Law of Restitution* (1978), 16 Osg. Hall L.J. 517, at pp. 559 *et seq.*; J.P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds* (1973-74), 87 Harv. L. Rev. 1597; J.P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation* (1974-75), 88 Harv. L. Rev. 849.

¹⁵⁶ *Supra*, footnote 62.

decision not simply because it was made, but because P2 was under a duty to have participated in the first action and did not).

An alternative approach is to call in aid the device of using the former judgment as "*prima facie* evidence subject to rebuttal". Not only is this strategy less draconian than the *Bomac* solution, it is potentially more powerful. A drawback to the "should have joined or consolidated" rule is that it is ineffective as against plaintiffs who cannot be shown to be improper "wait and see" plaintiffs, because they did not have knowledge of the earlier proceeding. Obviously in such circumstances, the argument for doing anything is much weaker since such plaintiffs are not, by definition, exercising any "option effect". However, even with respect to such plaintiffs there is respectable precedent for making some fair usage of the prior adjudication, thus maximizing judicial efficiency.¹⁵⁷ Where such usage is made of the prior determination as against an improper "wait and see" plaintiff, it should be effective in discouraging wait and see tactics. If a plaintiff realizes that an adverse decision in action #1 will become *prima facie* evidence subject to rebuttal in action #2, the plaintiff will presumably think very carefully before abstaining from participation in the first action where the *prima facie* adjudication will be made.

"First case strategies" are not adjudicative rules, rather they are case management techniques designed to marshal together multiple claimant cases with a view to bringing about (if settlement does not occur)¹⁵⁸ a common or "test case" adjudication to which can then be attached the type of estoppel effects already discussed. The second case strategies will go a long way towards achieving this. But rather than leaving matters to the parties, the court system should take the initiative, through "managerial judging",¹⁵⁹ especially in mass disaster cases where there will be multiple claimants.

Case-tracking systems can be put in place requiring all litigants and lawyers on the filing of the initial documents (either claim or defence) to indicate to the court whether there are presently pending related claims or whether there are likely to be so in the future.¹⁶⁰ The court should be given the power, on its own motion where necessary, to consolidate such actions and to devise one or more test actions, insuring typicality of facts and adequate representation by lead counsel,¹⁶¹ with provision

¹⁵⁷ See, *supra*, the text at footnote 134.

¹⁵⁸ Resnik, *op. cit.*, footnote 8, notes that a very high percentage of cases consolidated in the United States through the Multi-District Litigation Panel are disposed of during the pre-trial process (usually by settlement) and never reach trial.

¹⁵⁹ See J. Resnik. Managerial Judges (1982-83), 96 Harv. L. Rev. 374, for a critical account of such practices. For a contrary view, see S. Flanders, Blind Umpires—A Response to Professor Resnik (1983-84), 35 Hast. L.J. 505; E.D. Elliott, Managerial Judges and the Evolution of Procedure (1986), 53 U. of Chi. L. Rev. 306.

¹⁶⁰ See, for example, T.M. Mengler, Gathering Related Litigation in Illinois (1988-89), 20 Loyola U.L.J. 937.

being made for those parties not having carriage of the claim or defence in the test case to contribute to the cost thereof. (Steps in these directions have already been taken in Canadian litigation).¹⁶² The court should also be given power to direct advertising as to the existence of the litigation and inviting potential claimants to join in the litigation. Taken together, these proposals move in the direction of creating a court centred, rather than a private litigant centred, class or group action and represent a move towards making at least mass disaster litigation a public commodity rather than a private commodity. For most Commonwealth jurisdictions that lack an effective class action mechanism, this will be an improvement.¹⁶³

¹⁶¹ On both of these matters there is a wealth of experience in the United States in class actions. See, for example, Mullinex, *loc. cit.*, footnote 109, at p. 1083. On questions of representations, see, for example, B.G. Garth, Conflict and Dissent in Class Actions: A Suggested Perspective (1982-83), 77 Nw. U.L. Rev. 492.

¹⁶² In *Whiteoak Lincoln Mercury Sales Ltd. v. Canadian Pacific Ltd.* (1982), 30 C.P.C. 136 (Ont. H.C.), it was ordered that 398 actions, brought by more than 900 plaintiffs, arising out of a train derailment (involving noxious chemicals and which led to a large urban area being evacuated for several days) be tried together. Five categories of claims were established as to each of which there was a "scheduled plaintiff" who would have primary carriage of the actions; production and discovery were to take place only between the scheduled plaintiffs and the defendants; non-scheduled plaintiffs were not required to take any steps until the issues of liability and entitlement to recovery for categories of damages had been resolved in the actions of which the scheduled plaintiffs had carriage. Thus plaintiffs were given the option not to appear at trial, "in the confidence that all issues of liability will be disposed of in the test cases that emerge". However, "clients electing to await the outcome of liability should not enjoy a free ride. Some modest contribution to the costs of lead counsel may be provided in the discretion of the trial judge". The judge commented that the order he made "may not satisfy all parties but it does, in my view, represent the desire of all counsel to create a workable system out of chaos". As a precursor to the order in the *Whiteoak* litigation, the court had earlier made an order staying many of the related actions: *Canada Systems Group (Est.) v. Allendale Mutual Insurance Co.* (1983), 33 C.P.C. 210 (Ont. Div. Ct.). For a contrary American view, see R.H. Transgrud, Joinder Alternatives in Mass Tort Litigation (1984-85), 70 Cornell L. Rev. 779 (although more efficient adjudication of liability issues in mass tort cases would be desirable, it is improper to seek this end through consolidation or common question class actions leading to the joint trial of the issues common to the related claims, as it affects adversely the traditional right of tort litigants to control the individual prosecution of their liability claims).

The type of consolidating orders and case management techniques employed in *Whiteoak*, achieved much of what is suggested in the text. The court's approach was facilitated by the Ontario Rules of Civil Procedure, Rule 37.15 permitting the assignment of a single judge of all pre-trial motions in complicated cases or numerous cases involving the same issues. Similar techniques are being currently employed in Ontario in the litigation arising out of the *Air India* disaster over the Irish sea.

¹⁶³ On the limited scope for class actions in Commonwealth law, see W.A. Bogart, Questioning Litigation's Role—Courts and Class Actions in Canada (1986-87), 62 Ind. L.J. 665; K. Uff, Class, Representative and Shareholders' Derivative Actions in English Law (1986), 5 Civ. Just. Q. 50. In Canada, at present, a viable class action procedure exists only in Quebec. This may be about to change with the introduction of a class action bill in (trend-setting) Ontario: Class Proceedings Act, 1990, introduced June 12, 1990.

Such a move—towards the “aggregation” of litigation—is emerging in Canada. As Judith Resnik has documented,¹⁶⁴ in the United States it has already emerged not only through class actions, but more significantly through the device of the multi-district litigation panel,¹⁶⁵ and recent proposals by the American Law Institute’s Complex Litigation Project¹⁶⁶ would take this trend towards nation-wide aggregation of litigation even further. However, in providing means for the aggregation of claims initiated in different regions of the country, the Americans are far ahead of Canada, which could create real difficulties when faced with nation-wide litigation.¹⁶⁷

Conclusion

The direction in which the English, and certainly the Canadian, law has developed vindicates Lord Denning’s approach in *McIlkenney*¹⁶⁸ favouring non-mutual issue estoppel over abuse of process. Our desire to prevent duplicative litigation involving one common party is based simply on the fact that the same issue has been previously determined against the common

¹⁶⁴ *Op. cit.*, footnote 8. The phenomenon is, however, primarily motivated by the need of the courts to process efficiently related claims, rather than to counter specifically the “option effect”. Resnik observes that while class actions have frequently been a source of controversy in the United States, court-centred aggregation of litigation has been well received and has experienced little opposition. See also R.D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigation Unit* (1989), 50 U. Pitt. L. Rev. 809; S. Yeazell, *Collective Litigation as Collective Action* (1989), U. Ill. L. Rev. 44; R. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Law Suit Structure from the Field Code to the Federal Rules* (1989), 89 Col. U.L. Rev. 1; R. Bone, *Personal and Impersonal Litigation Forms: Reconceiving the History of Representation* (1990), 70 B.U.L. Rev. 213.

¹⁶⁵ The multi-district litigation statute, 28 U.S.C., para. 1407(a), permits a single judge to preside during the pre-trial phase in consolidated cases pending in federal courts throughout the United States.

¹⁶⁶ The A.L.I. Complex Litigation Project, Tentative Draft No. 1 (April 14, 1989), and Tentative Draft No. 2 (April 6, 1990), enthusiastically endorses aggregation through consolidation and proposes statutes providing for both federal intrasystem consolidation and federal-state intersystem consolidation, a Complex Litigation Panel with authority to promulgate nation-wide rules, express powers in transferee courts to enjoin related proceedings in state or federal court, to notify non-parties of the pendency of an action (inviting intervention and providing *prima facie* for preclusion whether or not they intervene) and to choose what substantive law to apply: Resnik, *op. cit.*, footnote 8.

¹⁶⁷ In Canada constitutional limitations on the jurisdiction of the national trial court—the Federal Court of Canada—prevent it from handling disputes between the subject and subject: see J. Evans and B. Slattery, *Case Comment* (1989), 68 Can. Bar Rev. 817, for an analysis of the case law. This will prevent that court from playing the central, national role taken by the federal courts in the United States: see Resnik, *op. cit.*, footnote 8. How then in Canada will we deal with a nation-wide litigation? In the *Air India* litigation (*supra*, footnote 162), multiple claims have been filed in both Quebec and Ontario. Presently, by agreement, the Quebec actions have been stayed and the Quebec plaintiffs are in fact “participating” in the Ontario litigation by being represented at various pre-trial and settlement conferences.

¹⁶⁸ *Supra*, footnote 55.

party by an earlier court, and does not turn on any additional factors or behaviour requiring the invocation of "abuse of process". What we are seeking to do is to prevent relitigation, in such circumstances, by the application of an estoppel arising from an earlier judgment. As Lord Denning pointed out, this is the province of the doctrine of issue estoppel, liberated from the requirement of the same parties and mutuality. Attempting to deal with the problem by using the vague concept of abuse of process adds nothing, except confusion, and it should not be used given that we already have a doctrine—issue estoppel—specifically designed to deal with the problem. Moreover, replacing abuse of process with non-mutual issue estoppel locates the solution within the appropriate doctrinal and policy context. This is important in itself and has the added advantage of exposing us to the experience of United States courts with this doctrine.

Courts have likely been attracted to the discretionary doctrine of abuse of process because of the (quite accurate) perception that, in this area, discretion is important to ensure that preclusion does not operate unfairly. But discretion is also an essential part of the doctrine of non-mutual issue estoppel. That rule replaces a general requirement of mutuality, subject to exceptions (*i.e.*, for privies), with a general principle of non-mutuality, subject to discretionary exceptions (*e.g.*, fairness). Adopting non-mutual issue estoppel does not lock courts into a rigid rule. Indeed, quite the contrary. It is a rule whose overall thrust is clear, but with a large discretionary element.

Courts should abandon abuse of process, and the requirement of mutuality, in favour of non-mutual preclusion. However, in adopting this approach, particular care must be taken to ensure that its underlying policies, fairness and judicial efficiency, are fulfilled. In particular, the "option effect" inherent in offensive non-mutual preclusion must be disarmed and this may be done through "second case strategies" designed to force or encourage all claimants to assert their claims in the first action. Ideally, in mass disasters cases the courts should invoke consolidation and case management techniques to bring about typical test case adjudications which will resolve all consolidated claims, or will provide a solid basis for non-mutual preclusion. Further, the courts should permit the use of judgments as "*prima facie* evidence subject to rebuttal" when non-mutual preclusion is inapplicable. Such usage avoids the prior adjudication being wasted, while at the same time protecting the parties' right to fairness, since they are still free to call evidence to rebut the *prima facie* evidence.